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Supreme Court of the United States

OCTOBER TERM, 1954

No. 70

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS", PETITIONER,

vs.

S/S "WINDING GULF" AND MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 10, 1954

CERTIORARI GRANTED OCTOBER 14, 1954

SUPREME COURT OF THE UNITED STATES

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

No. 2757

BOSTON IRON & METAL COMPANY, as Owner of the Canadian Destroyer "St. Francis",

v.

S. S. WINDING GULF, Her Engines, Boilers, etc., and MASSACHUSETTS TRUSTEES OF EASTERN GAS & FUEL ASSOCIATION

OPINION—Filed June 10, 1947

IN ADMIRALTY

CHESNUT, District Judge:

This case grows out of a collision at sea between the "SS Winding Gulf" and an obsolete "Destroyer" being towed in tandem with another old Destroyer, both belonging to the Boston Iron & Metal Company, a Maryland corporation, which had recently purchased them from the Canadian Government for scrapping. The place of the collision was in the open waters near Buzzards Bay, Massachusetts. The time was about 10 P. M. (E. W. T.) July 13, 1945.

The Boston Company had entered into a towing contract dated July 3, 1945, with the Foundation Maritime, Ltd., a Canadian towing corporation, to furnish motive power for towing the two Destroyers from Sydney, Nova Scotia, to [fol. 31] Baltimore, Maryland, by way of the Cape Cod Canal around Block Island (off the east coast of Long Island), the Delaware Bay and the Chesapeake and Delaware Canal to Baltimore. The voyage from Sydney through the Cape Cod Canal was without incident. After traversing the Canal the tow was reassembled in charge of a tug (the Peter Moran) furnished by the Moran Towing Company of New York for Foundation Maritime, Ltd. To the towing contract were annexed printed conditions which included the following: "The master and crew of such tug or tugs used in the said services become the servants of and identified with such vessel or craft and their owners, and

that the Tug Company only undertakes to provide motive power."

As a result of the collision the particular Destroyer known as the "I-24" subsequently sank and became a total loss. There was also some substantial damage to the stem of the Winding Gulf. On November 14, 1945, the Boston Company filed its libel in this court against the Winding Gulf to recover damages for the loss of the Destroyer. The Massachusetts Trustees of Eastern Gas & Fuel Association filed a claim in the case as owner of the Winding Gulf, and also a cross-libel in personam against the Boston Company. They have also filed and there is now pending a libel against the tug Moran or its owner, in the Southern District of New York. Answers were filed by the respective respondents to the claims in this court and extensive testimony has been taken and arguments of counsel have now been heard.

As is frequently the case in maritime collisions of this nature, there is much controversy and uncertainty as to the precise conditions and causes of the collision. In this case [fol. 32] the evidence is conflicting with respect to (1) whether the hawser connecting the Destroyer with the tow had parted before the collision; (2) whether the Destroyer had proper lights and was properly manned before and at the time of the collision; (3) whether the Winding Gulf was justified in maintaining her course, direction and speed shortly before the collision by reason of the fog; (4) the density of the fog at the time and (5) whether the length of the tow from the tug was unreasonably long for the time and place. The difficulty in determining the precise and actual facts is enhanced in the particular case by (a) the absence of any person or persons as a crew on board the Destroyer at the time of the collision; (b) the entire absence of any evidence to show where or how the hawser was parted other than the probable result of the collision and (c) the fact that the evidence of the principal witnesses for the Boston Company was necessarily taken by deposition instead of in court.

In reaching a conclusion as to the ultimate facts it will be helpful to first state such of the facts of the case as are definitely and clearly established without substantial contradiction.

The tug was of adequate size and power for the towing. The Winding Gulf was a steam vessel of the three island type of superstructure, about 400 feet long, 55 foot beam and 35 foot depth carrying a cargo of coal from Newport News, Virginia, through Long Island Sound by way of the Cape Cod Canal to Boston. The two Destroyers were in tow in tandem. They consisted of the "I-93", the first in the tow, and the "I-24", the second and last vessel in the tow. The I-93 was connected with the tug in the usual adequate way first by a wire pennant 50 feet long and a new 11-inch manila [fol. 33] hawser. In turn the I-24 was connected with the I-93 by similar wire pennant and a 10-inch hawser about 5 to 6 months old but in good condition. The Destroyers were each about 300 feet in length. The length of the tow line from the tug to the first Destroyer was 250 fathoms (1500 feet) and the length of the tow line from it to the I-24 was 200 fathoms (1200 feet). With the length of the two Destroyers the whole tow from the tug to the stern of the I-24 was thus about 3300 feet, or about three-fifths of a mile. Neither Destroyer had any member of a crew on board, neither had any motive power, and both were "dead" ships.

Shortly before the collision the course and direction of the tug was southwest by west; while the course of the Winding Gulf was east by one-half north. The Winding Gulf was displaying the usual navigation lights for a vessel of her class and size. The tug displayed, among other lights, three white lights vertically arranged signifying a tow in the rear. The lights did not indicate how may vessels were in tow nor the length of the tow. The first Destroyer in the tow line had one white light displayed in proper place; the second Destroyer had two lights, one white and the other intended to be white, in proper place, indicating that it was the last vessel in the flotilla. A fog set in between 8 and 9 o'clock P. M. The master and deckhand on the tug testified that they saw the lights on both Destroyers just before the fog shut them out, about 9 P. M., shortly after the tug passed Hen and Chickens Lightship.

Fog signals were being sounded both by the Winding Gulf and the tug. The two vessels heard each other's fog signals and also saw their respective lights when the Winding Gulf was about half a mile to the west of the tug, and two points on the starboard bow of the tug. When the two

vessels came abreast of each other the Winding Gulf was about a quarter of a mile distant to the north of the tug. The tug was proceeding about southwest and the Winding Gulf nearly due east. The speed of the tug was about 4 [fol. 34] knots an hour and that of the Winding Gulf about 6 knots per hour. In this situation it is fairly apparent that the course of the Winding Gulf, unless changed, would intersect the flotilla at some point. The Winding Gulf did not change either its speed or its course with the exception that shortly thereafter the master changed his course for three or four minutes to one point to the north, not for the purpose of avoiding the tug or tow but because he desired to steer somewhat closer to the buoys on his north. The master of the Winding Gulf, who was on the bridge at the time, frankly admitted that he did not know or suspect the length of the tow line, and thought a quarter of a mile distance between his ship and the tow was quite sufficient to clear the tow, especially after he had looked for and failed to see anything in tow of the tug through his binoculars.

The exact time when the two ships came abreast as above described is uncertain. The master of the Winding Gulf, Captain Godfrey, testified that he had passed on his north "U" buoy at 9:21 P. M. as recorded on the ship's log; that he saw the lights of the tug a few minutes thereafter, at say 9.25, and that he was abreast of the tug and passed it about 9.35. From "U" buoy to the next buoy "V" was two and one-half miles. He passed "V" buoy at 9:45 according to the log time, and the collision with Destroyer I-24 occurred at 9.54 by the clock on the bridge and 9.51 by the engine room clock, which, it is said, was three minutes slower. Immediately before the collision occurred the lookout on the Winding Gulf, about 125 feet forward from the bridge, sounded the bell and ran down the ladder and called to the bridge that there was an object dead ahead. Before the lookout could get back to his post the collision had occurred. The stem of the Winding Gulf struck the starboard aft side of the Destroyer. The lookout had seen no lights on the Destroyer before the collision but immediately thereafter did see what he described as a dim red light at the mast-[fol. 35] head and another dim white light on the other side of the yardarm. Immediately on notice of imminent collision the master telegraphed the engine room to stop the

engines. The time recorded on the engine room clock was 9.51. After the collision others on the Winding Gulf also saw the lights mentioned on the Destroyer. The adequacy of these lights will be later discussed. At 10.10 P. M. the Winding Gulf sent a radio message to the Coast Guard. In it the radio operator described the fog at that time as a "dense fog". The Coast Guard responded and endeavored to tow the Destroyer to land but she sank before reaching land. Before pulling away from the Destroyer Captain Godfrey ascertained that there was no one on board the Destroyer by numerous loud blasts of the ship's whistle. He also ascertained that his own ship had been damaged and was slowly leaking forward. He then proceeded to put her in a position of safety before continuing the voyage.

We return now to the activities of the tug upon first seeing the lights of the Winding Gulf half a mile to the west. The tug had a crew of about 15 men but only the master, a Captain George, and a deckhand, one Mackey, were on deck. The depositions of both were taken. The master testified that on sighting the Winding Gulf he blew two blasts of the whistle to signify an intended starboard passage, and received a similar confirmation from the Winding Gulf. When the vessels were abreast he feared that the course of the Winding Gulf would intersect the tow and thereupon, as he testified, he sounded the danger signal on the tug's whistle. He also said that the tug in addition to the three vertical white lights indicating a tow, had two red lights displayed which he said was a warning light about the tow or indicated a tow not under complete control. Pursuant to the signals for a starboard passage he changed his course about four points to the south but noticed that the Winding Gulf did not change her course. A few minutes after pass-[fol. 36] ing the Winding Gulf (estimated by Mackey as about four or five minutes) he noticed that the tug was picking up speed and immediately inferred that one of the Destroyers was off the tow line and telephoned or radioed for help to the Coast Guard. He then circled around for several hours but did not learn until the next morning what had happened.

The most important fact in controversy is whether the hawser of the Destroyer had parted before the collision. On behalf of the Winding Gulf it is contended that it had

and that the Destroyer was at the time of the collision a "dead" ship, loose and adrift without crew, motive power or adequate lights. There is no physical evidence in the case where or when or how the hawser parted and the Destroyer thereupon became disconnected from the tow other than the reasonable inference that the parting of the hawser was due to the impact of the collision. The contention on the part of the Winding Gulf that the hawser had parted and the Destroyer was loose and adrift prior to the collision is based solely on estimates of time and distance by Captain Godfrey. Reliance is placed on the circumstantial evidence that there must have elapsed a period of time variously estimated at 9 to 15 minutes or more between the time of passing the tug and the collision. More specifically, the argument is that as the Winding Gulf was making 6 knots per hour, or about a mile in ten minutes, it would necessarily have struck the Destroyer or some part of the tow line within less than 9 minutes after passing the tug if the second Destroyer had still been on the tow line connected with the first Destroyer, because the tow line was only about three-fifths of a mile long. There is also some little additional circumstantial evidence brought forward on behalf of the Winding Gulf in support of its contention. Thus, it is said that at the time of the collision it did not definitely appear that the Destroyer was going forward in [fol. 37] the water and, perhaps less importantly, it is suggested that if the tug had been only three-fifths of a mile distant at the other end of the tow line at the time of the collision the master of the tug must have heard the loud blasts from the Winding Gulf just after the collision.

Counsel for the Winding Gulf also submits an argument implemented by superimposing on a chart of the waters in question, a diagram of the course of the Winding Gulf and the tug respectively said to be based on the evidence given by their respective captains, to the effect that the course of the Winding Gulf would not and could not have intersected the tow line. The course of the Winding Gulf so diagramed seems to be correct from the evidence; but the course of the tug as so plotted is based on uncertain assumptions, and I am not able to say in view of the uncertainties, that the thus projected course of the tug is correctly outlined in the diagram.

I have given careful consideration to the several contentions made on behalf of the Winding Gulf that the I-24 had broken loose from the flotilla at the time of the collision, but weighing the evidence as a whole I have reached the contrary conclusion. There are several important considerations which lead to this conclusion: (1)There is no direct or definite evidence that the hawser of the I-24 had parted before the Winding Gulf and the tug came abreast of each other; (2) the collision occurred certainly within a few minutes after this point of time; (3) the sea was calm with little or no wind; (4) the hawsers in the tow line were adequate and in good condition; (5) it is quite improbable that the hawser parted in the very few minutes elapsing between the passage of the two vessels; (6) the stated course of the Winding Gulf would apparently have intersected the flotilla at some point in a few minutes in view of the distances and courses of the Winding Gulf unless changed; (7) and it is quite significant that Captain Godfrey, on the bridge of the [fol. 38] Winding Gulf, testified that if he had known the length of the tow line he would have altered his course. The main contention of the Winding Gulf is based on the estimated elapsed time between the passage of the two vessels and the subsequent collision. It is true that Captain Godfrey's testimony seems precise and the calculations based thereon, if the time of the passage of the two ships is accepted as given by him, would lead to the conclusion that the elapsed time was greater than would have occurred if the flotilla had been intersected by the Winding Gulf. But the uncertain point in the evidence of Captain Godfrey is as to the time of the passage of the two ships; and on this particular point I accept the simpler testimony of the Captain and deckhand of the tug, which was to the effect that within four or five minutes after the two ships were abreast they noted that the tug was picking up speed, from which the fair inference, subsequently confirmed by the discovered fact, was that the tow line had parted. And this is entirely consistent with the courses and distances of the vessels.

On the affirmative side I conclude that the explanation given by the master and deckhand of the tug is more reasonable and probable. While not based on recorded time elapsing nor matematical computations, it seems to me

more probable in view of the known facts. It was to the effect, as previously mentioned, that within a few minutes after the two ships had passed each other it was noticed the tug was picking up speed. In view of the known length and course of the tug and the speed and course of the Winding Gulf, it is clear that the Winding Gulf must have intersected the three-fifths of a mile tow line within five or six minutes after passing the tug. There is no fixed point of time by any one as to just when this passage did take place. In view of the whole situation, I think the sounder view is to accept the evidence of the master and deckhand, of the [fol. 39] tug on this point. I therefore find that the Destroyer was still on the tow line at the time of the collision.

The only clear and effective cause of the parting of the hawser shown by the evidence was the collision. And this was a reasonably adequate cause. The Winding Gulf was heavily laden with a cargo of coal. Her speed was 6 knots per hour and at that speed she could not be stopped in less than a quarter of a mile. She struck the Destroyer within less than a minute after the lookout sighted her. She remained interlocked with the hulk of the destroyer for several minutes thereafter. Assuming the hawser holding the Destroyer was partly slack in the water at the moment of the collision, the forward motion of the ship due to the impact doubtless tautened and snapped the hawser.

Another important controverted matter is whether the master of the Winding Gulf was at fault in not changing either speed or course on passing the tug. He knew that the tug had a tow behind but did not know the number of vessels in tow nor the length of the tow. He was unable to locate the tow at any time through his binoculars. He says that he heard no whistle signals from the tug other than the usual fog signals and those which indicated the tug had a tow. He saw, at one time at least, a red light on the tug but assumed it was probably the usual port light. Later he failed to see even that. He also said that he heard no danger signals from the tug. He did, however, frankly concede that he would have changed his course had he known the length of the tow line. He says he assumed that the length of the hawser from the tug to tow would be not more than 75 fathoms or 450 feet, in accordance with the inland rules

of navigation; but he did not know or learn how many vessels might be in tow with 75 fathoms lines. The inland rules permit four such tows in tandem with an aggregate of possibly more than 2000 feet of towage, nearly half a [fol. 40] mile,[1] and indeed the rule does not absolutely limit the length of the tow line in any case because it provides for the exercise of the judgment and discretion of the master of the towing vessel with respect to the length of the hawser, with exceptions as to certain named localities not including the waters where this collision occurred. The master of the Winding Gulf should have known that his course unless changed might intersect the flotilla at some point. When, after passing the tug, he could not pick up any part of the flotilla through his binoculars, he still did not change his course or slacken his speed. He said he assumed he had

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Note 1: Authority for the regulations with respect to navigation of inland waters, which is here applicable, is to be found in 33 USCA, s. 152 which presently authorizes the Coast Guard to promulgate such regulations. In accordance therewith the length of tow lines of seagoing barges within inland waters is to be found in "Comparative Rules of the Road", published by the United States Coast Guard, 1946, page 90, which reads:

"*Tows of seagoing barges within inland waters.*—Tows of seagoing barges navigating the inland waters of the United States are limited in length to five vessels, including the towing vessel or vessels.

Hawser length; general.—With the exception noted below, hawsers are limited in length to 75 fathoms, measured from the stern of one vessel to the bow of the following vessel; and should in all cases be as much shorter as the weather or sea will permit.

Hawser length; exceptions.—In all cases where, in the opinion of the master of the towing vessel, it is dangerous or inadvisable, whether or account of the state of the weather, or sea, or otherwise, to shorten the hawsers, hawsers need not be shortened to the prescribed length, except that hawsers must in any event be shortened to the prescribed length upon reaching the applicable locality named below:"

passed the tow. This assumption was hardly a prudent one to make.

There is further uncertainty as to the density of the fog. The Captains of both the steamer and the tug said that the visibility as to the lights (not as to the bulk of the ships) was half a mile despite the fog; but other witnesses, possibly less experienced in navigation, described the fog as "dense". The inland rules require slackening of speed in fog, dependent upon its density, of course, sufficiently to insure safety and avoidance of collision.[2]

[fol. 41] On the whole evidence I find as a fact that the Winding Gulf was at fault in maintaining her speed and course without change, and this was a proximate cause of the collision. She is therefore liable to the Boston Company for damages to the Destroyer unless there was clearly contributing fault of the tow.

The faults attributed to the Destroyer by the Winding Gulf are (1) that the flotilla was longer than permitted by the rules of navigation; (2) that the Destroyer was not properly manned by a crew and (3) she did not carry adequate lights.

With respect to the alleged improper length of the flotilla, it has been pointed out above that there is no absolute rigid length for tow lines. There is also affirmative evidence in this case by a tug captain, Cullison, who had been employed by the Boston Company for about a year after the collision and had successfully towed ten or more similar old destroyers from Canada to Baltimore, that it was the usual practice to tow them in tandem on hawsers of similar length to that used in the instant case and through these same waters. But it is also to be noted that as the tow line was of unusual length that fact imposed on the tug and tow the obligation to use great care to avoid accident. The Gladiator, 79, F. 445; 446; The Mt. Hope, 82 F. 910, 912; The

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Note 2: "Every vessel shall, in fog, mist, falling snow or heavy rain storms, go at a moderate speed having careful regard to the existing circumstances and conditions." "Comparative Rules of the Road", published by the United States Coast Guard, p. 69 (former Pilot Rule 13); See also 33 USCA, s. 157.

Samuel Dillaway, 98 F. 138, 141; The Gertrude, 118 F. 130, 131; The Admiral Schley, 131 F. 433, 434; The H. M. Whitney, 86 F. 697, 700. This emphasizes the importance of a crew on the Destroyer to see that the lights were kept sufficiently brightly burning, and at least suggests the desirability of a crew equipped with whistle or fog horn to warn of the presence of the Destroyer in the unusually long flo- [fol. 42] tilla. There is positive evidence of several witnesses for the Winding Gulf that the lights on the Destroyer at the time of the collision were inadequate. The dim red light referred to probably was due to the obscuration of the glass by the smoke. The other light, although white, was dim. Neither light was electric but only kerosene lamps although said to be regulation ships' lights.

I find from the evidence that the lights on the Destroyer were inadequate and insufficient at the time of the collision. I also find that it was imprudent not to provide a crew on the Destroyer to attend to the lights and to see that they were kept brightly burning, and to have equipment for the sounding of fog signals to indicate the presence of the Destroyer in this unusually long flotilla. The above named witness Cullison, called by the libelant, who was familiar with the towing of destroyers for similar voyages, testified that in his opinion the failure to provide a crew on the Destroyer was not prudent. I also find that these faults contributed to the collision. It will be remembered that the stem of the Winding Gulf struck the Destroyer on the starboard side well aft. It is thus apparent that the collision occurred only by a very narrow margin of time and could have been avoided by a slight sheer to port by the Winding Gulf, if the lights on the Destroyer had been sufficiently bright to have been seen by the lookout on the bow of the Winding Gulf shortly before he first discerned the hulk of the Destroyer dead ahead. While there is some uncertainty as to the density of the fog at the precise time, it seems highly probable that if the lights on the Destroyer had been reasonably adequate they could and would have been seen by the lookout before he observed the hulk of the vessel.

[fol. 43] It is contended by counsel for the Boston Company that these facts are immaterial in this case because the Destroyer was an inert tow wholly under the charge

of the tug and therefore the tow was not itself responsible to the Winding Gulf. Robinson on Admiralty, pp. 679-683; Sturgis v. Boyer, 24 How. 110. And it is further argued that if there were faults with respect to the lights and absence of crew on the Destroyer, the complaint of the Winding Gulf with respect thereto can be properly asserted only in the libel against the tug, or its owners, now pending in the Southern District of New York. But after much consideration I have reached the conclusion that in view of the contract between the Boston Company and the Foundation Maritime, Ltd., above referred to, these faults with respect to lights and absence of crew must be attributed directly to the owner of the Destroyer. The contract provided (1) that the Towing Company agreed to provide only motive power; (2) that the "two vessels will be taken as a double tow, that is, two vessels in tow of the one tug"; (3) that in the towage service the master and crew of the tugs used "become the servants of and identified with such vessel and craft or their owners"; and (4) that the Tug Company would not be responsible for the acts or defaults of the master or crew of the tug, nor for any damage from whatsoever cause arising that may occur either to the vessels towed or to any other ship, vessel or property of any kind. And the Towing Company was to be held harmless and indemnified by Boston Company against all such damages. It is also fairly inferable from the contract as a whole that the towage of these two old and obsolete destroyers as a double tow for the long voyage from Sydney, Nova Scotia, to Baltimore, Maryland, through the two Canals, was regarded as particularly hazardous, and that the Boston Company, having purchased the destroyers for scrapping, was desirous of having them delivered in Baltimore at minimum expense of transportation, and taking all the risks of the voyage.

[fol. 44] When the contract was first offered in evidence at the trial of the case, I had the view that, being a contract between parties other than the owners of the Winding Gulf, it was probably material only for its indication that the particular towage contract was a hazardous one; but later, after inviting and receiving argument on the point from counsel for the parties, I have concluded that the provisions and subject matter of the towage contract legally result in mak-

ing the faults with respect to the lights and absence of crew on the Destroyer directly attributable to the owner of the tow, and that these faults may be ascertained in this case without the circuity of action due to their first being litigated in a suit by the Winding Gulf against the tug or its owners. I assume, of course, that any question of indemnity arising under the contract could not be litigated here in this case; but nevertheless the absence of adequate lights and crew upon the Destroyer constituted defaults by the master of the tug who, by the terms of the contract, became in this respect the servant of the Boston Company. Where injury to third persons results from the faults of the tow itself the latter is directly liable to the third person. Robinson, pp. 679, 680; Sturgis v. Boyer, 24 How. 110, 122; and see The Eugene F. Moran, 212 U. S. 466, where a tow was held liable for the absence of required lights.

The validity of a provision in a towage contract making the master or crew of the tug the servant of the owners of the tow has heretofore been the subject of much diverse judicial consideration. See Robinson on Admiralty, pp. 670-673. But this has now finally resulted in the establishment of the validity of such a contract. Sun Oil Co. v. Dalzell Towing Co., 287 U. S. 291 (1932); The Primrose, 3 F. S. 267; The H. C. Jefferson, 69 F. S. 650. The prevailing underlying principle is based on the proposition that a tug is not a common carrier and therefore the Towing Company may stipulate against its own negligence or default. [fol. 45] My conclusion as to the ultimate facts, therefore, is (1) that the Winding Gulf was at fault in navigation in not changing her course or speed; (2) that the owner of the Destroyer was at fault with respect to lights and absence of crew; (3) that the faults of both contributed to the collision and damage and (4) therefore an interlocutory decree must be passed in accordance with the usual maritime rule for a division of the damages. Counsel may submit the appropriate decree in due course.

W. Calvin Chesnut, U. S. District Judge.

[fol. 46] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

[Title omitted]

INTERLOCUTORY DECREE—Filed September 5, 1947

The above-entitled cause having come on for trial and having been heard on the pleadings and proofs of the respective parties and having been argued and submitted by the advocates for the respective parties and due deliberation having been had thereon, and the Court having rendered its decision in writing, holding both the "Winding Gulf" and Boston Metals Company, as owner of the I-24, at fault and directing a decree accordingly,

Now on motion of John H. Skeen and Frank, Skeen and Oppenheimer, Proctors for Libelant, it is

Ordered that the Opinion of the Court heretofore filed herein on the 10th day of June, 1947, be and it is hereby adopted as the Court's findings of fact and conclusions of law pursuant to Supreme Court Rule 46½; and it is further

[fols. 47-77] Ordered, Adjudged and Decreed that Libelant, Boston Iron and Metal Company, as owner of the Destroyer, I-24, recover of and from SS "Winding Gulf", her engines, etc., and the Massachusetts Trustees of Eastern Gas and Fuel Associates, claimants and respondents, one-half of the damages suffered by Libelant arising out of the matters set forth in the Libel herein; and said Massachusetts Trustees of Eastern Gas and Fuel Associates, owners of SS "Winding Gulf", having filed herein their cross-libel against Boston Metals Company, formerly Boston Iron & Metal Company, cross-respondent, it is further

Ordered Adjudged and Decreed that Massachusetts Trustees of Eastern Gas and Fuel Associates, as owners of the SS "Winding Gulf", cross-libelants, recover of and from Boston Metals Company, cross-respondent, one-half of the damages suffered by them arising out of the matters set forth in the cross-libel and it is further

Ordered, Adjudged and Decreed that Libelant, Boston Metals Company, and cross-libelants, Massachusetts Trustees of Eastern Gas and Fuel Associates, each recover one-half of their respective costs from the other.

W. Calvin Chesnut, United States District Judge.

Approved as to Form: John H. Skeen, Frank Skeen & Oppenheimer, Proctors for Boston Metals Company, Libelant and Cross Respondent; Bingham, Dana & Gould, Niles, Barton, Morrow & Yost, Proctors for Massachusetts Trustees of Eastern Gas & Fuel Associates, Cross Libelants and Claimants.

Dated: 9/5/47.

[fol. 78] IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF PROCEEDINGS, BALTIMORE, MD.

MORRIS SCHAPIRO.

* * * * * * *

Q. What is your occupation, Mr. Schapiro?

A. I am President of the Boston Metals Company.

Q. At the time of this accident in July, 1945, the name of the company was Boston Iron and Metal Company?

A. That is right.

* * * * * * *

[fol. 79] Q. Mr. Schapiro, do you yourself have any knowledge of this purchase by your company of these destroyers?

A. Yes, sir.

Q. How many destroyers did your company purchase from the Canadian Government?

A. Six.

Q. And five of them arrived at Baltimore?

A. Yes, sir.

* * * * * * *

[fol. 80] Q. It is stated in the trial memorandum which Mr. Skeen has submitted for the Boston Metals Company that the Foundation Maritime, a coastwise towing organization of Canada, towed these vessels from Sydney to the Cape Cod Canal. Did you enter into any arrangement with the Foundation Maritime regarding that towage?

A. We did.

Q. Who negotiated the arrangements with the Foundation Maritime for towing these destroyers?

Mr. Skeen: That is objected to.

The Court: I do not see the relevance of it, but I do not see that it will do you any harm. I do not know how to rule on it, whether it might or might not be important in the case.

Mr. Skeen: I think it is entirely irrelevant.

The Court: What is the question?

(The pending question was read by the Reporter.)

The Court: Oh, well, I will let Mr. Schapiro answer it. It might possibly have some bearing on the case.

The Witness: I did.

By Mr. Bolster:

Q. Was an agreement entered into between the Boston [fol. 81] Metals Company and Foundation Maritime relative to this towage?

Mr. Skeen: I object to that.

The Court: Overruled.

The Witness: There was.

By Mr. Bolster:

Q. Have you a copy of that agreement here in Court?

A. No. I have not.

Mr. Bolster: Have you a copy, Mr. Skeen?

Mr. Skeen: I have.

* * * * * * *

[fol. 82] The Court: Do you want him to identify this contract you have in your folder?

Mr. Skeen: Subject to the objection.

[fols. 83-162] The Court: Let him identify it. Just fold the paper temporarily. If you know this, you may speak, and say you will produce it at the proper time.

Mr. Skeen: Well, he is here, and the contract is here.

Mr. Bolster: Perhaps we might have the contract marked, Your Honor, Schapiro Exhibit 1 for identification, and then it can be held in that fashion.

The Court: That is what I am suggesting.

Mr. Skeen: All I am doing with this, under the instruction of the Court, and over objection, is to show this to Mr. Schapiro and ask him "Is this the contract?".

The Court: All right.

(Thereupon, Mr. Skeen exhibited the contract in question to the witness.)

The Witness: Yes, sir. That is the contract. It is a regular printed form of contract that was signed up and accepted—not for this particular tow, but we have a regular printed form for a contract.

Mr. Skeen: Mr. Bolster wants that marked Schapiro Exhibit No. 1 for identification.

The Court: All right. You may hold it if you want it.

(The contract in question was marked Schapiro Exhibit No. 1 for identification.)

* * * * * * *

[fol. 163] CAPTAIN PAUL F. CULLISON

The Clerk: Your name, please?

The Witness: Paul F. Cullison.

Direct examination.

By Mr. Skeen:

Q. Captain, what is your occupation?

A. I am a tugboat master.

Q. And how long have you followed that occupation?

A. I have been licensed since 1904.

* * * * * * *

[fol. 164] Q. And have you been continuously engaged as a tugboat captain practically your whole life?

A. Practically the whole time. Yes, sir.

* * * * * * *

[fols. 165-169] Q. How many destroyers have you towed, in your experience?

A. Oh, I think I have towed about thirty.

* * * * * * *

[fol. 170] By the Court:

Q. Well, have you personally towed any of these thirty destroyers under anything like similar circumstances?

A. Yes, sir.

* * * * * * *

Q. What destroyers were they, not necessarily the names?

A. They were the same type of destroyers, about 310 feet long by 32 foot beam, drawing ten feet aft and about six or seven forward.

* * * * * * *

[fols. 171-180] Q. You have on occasion towed two?

A. Yes, sir.

Q. Arranged in tandem this way?

A. Yes, sir; two of them.

Q. How long were the voyages on which you towed them?

A. Well, from Narragansett Bay to Baltimore, we would come down usually through the Chesapeake and Delaware Canal—made a voyage of about 500 miles,—pretty close to it.

* * * * * * *

[fols. 181-184] Q. Did those destroyers that you took down from Prudence Island have any crews?

A. Yes, sir.

Q. And what did they have aboard in the way of crews?

A. We had two men on each.

Q. Did they have any power at all?

A. No power whatever.

* * * * * * *

[fol. 185] Q. What was the function of the two men on each of those two destroyers that you brought down, Captain?

A. Well, we had them on there to keep the boats lighted up.

* * * * * * *

Q. It was part of their duty to see that proper lights were set and burning on the destroyers?

A. That is right, sir.

Q. And if the lights became dim, it would be their duty to clean them, would it?

A. Yes, sir.

Q. And trim them, see that they were kept full of oil, [fol. 186] and properly burning during the night hours?

A. Yes, sir.

* * * * * * *

Q. Captain, in your judgment would it be a prudent thing for you to undertake to tow those two destroyers from Narragansett Bay to Baltimore without any men on the destroyers?

Mr. Skeen: That is objected to.

The Court: Overruled. You may answer, Captain.

[fols. 187-354] The Witness: Well, in my judgment, it wasn't.

* * * * * * *

[fol. 355] PROCEEDINGS

The Court: Gentlemen, we will resume the case on trial. I believe there was an offer of evidence during the trial, on Monday, with regard to some contract between the Libellant and the towing company. I do not know that that question was disposed of.

Mr. Bolster: Your Honor, the way I understood it would be disposed of was this: I was about to offer it in evidence, and Mr. Skeen objected, and Your Honor excluded it. I then made an offer of proof as to what I thought the contract contained.

If Your Honor is disposed to change your mind on that point, I should like to offer it again, but if Your Honor is still of the opinion that it is not to be admitted, of course I shall not do so.

The Court: I do not understand that I made any final ruling with regard to its admissibility. I did not think it was admissible at that particular time, on cross examination, I think, because it occurred to me possibly there might be affirmative evidence from the Respondents. I did not look at the paper, and formed no opinion at that time as to

whether it was really relevant at a proper time in the proceeding.

* * * * * * *

[fols. 356-377] Mr. Bolster: I should like to offer it, Your Honor.

* * * * * * *

[fols. 378-460] The Court: I will admit the paper for whatever proper legal bearing it has on the issues in the case. I think it may have some. I am not clear that it has as much as contended for by counsel for the Respondents.

Mr. Skeen: This is a matter of some importance, perhaps more than appears. I understand that Your Honor admits it, and Your Honor notes that I object to it.

The Court: Yes, I noted your objection to it, and I overrule your objection and give you an exception. I have stated the limitations, probably, as to the effect of it on the liability in the case.

* * * * * * *

[fol. 461] Mr. Skeen: When you come to deal with the cross libel, in this respect it is different, you have to consider whether there is any affirmative proof, because there they undoubtedly do assume the burden of proving some fault on the part of the owner of the destroyer, or some fault on the part of the destroyer for which the owner is responsible. And in determining that, you would look to the evidence you have heard in this case, and decide whether there has been any such proof.

But, now, that is not the whole story, because, suppose they do satisfy you that in some respect the destroyer, not the owner, but the destroyer, is at fault. Suppose that—well, I can hardly imagine how it could be—but, if such a situation did arise, then the decree could not, in my judgment, go against the owner, for this reason, that the whole charge of this destroyer was put in the hands of the tug, and anything wrong that the destroyer did—and I say I cannot imagine what they did—but anything wrong the destroyer did would be the fault of the tug.

[fols. 462-505] The tug furnished the hawsers. The tug

put the lights on board, and lighted them. The tug took the tow, knowing that there was no crew on board, and that the destroyer was a dead ship. So that there isn't anything that I can imagine as a fault on the part of the destroyer that would not also be a fault on the part of the tug.

The reason I say I do not think you could make a decree against the owner of the destroyer on the basis of some fault on the part of the destroyer, would be because any fault that you found to be attributable to the destroyer would be the fault of the tug and not the owner of the destroyer. All the owner of the destroyer did was to engage the tugboat to bring the destroyer down there, on terms that were perfectly well understood on both sides. I am not talking about the contract. I do not think the contract ought to be in this case.

* * * * * * *

[fol. 506] In United States District Court

Libellant's (Schapiro) Ex. 1—For Identification

Foundation Maritime Limited
135-137 Lower Water Street
Halifax, N. S.

Salvage—Towing
Marine Construction

July 3rd, 1945.

Halifax Station, Telegraphic Address, "Foundation—Halifax", Wireless via Camperdown. Telephones: Day 3-7381, Night 3-7384.

Montreal Office, Telegraphic Address, "Foundation—Montreal", Code A, B, C, 6th Edition. Telephone Fitzroy 4671, day and night service.

Boston Iron & Metal Company, 313 East Baltimore St., Baltimore 2, Md.

Dear Sirs:

We confirm our telegram to you of yesterday and your reply wherein it is agreed that we will supply tug for the

towage of two former Canadian Navy Destroyers ("St. Francis" and "Hamilton") from Sydney, N. S. to Baltimore, Md. for the sum of Eleven Thousand Dollars ($11,000.00) U. S. Funds.

It is understood that these vessels are now ready at Sydney and that you have arranged to have them placed in seaworthy condition with all watertight doors closed and rudders secured amidships.

It is further understood that these two vessels will be taken as a double tow, that is the two vessels in tow of the one tug. It is further understood and agreed that our services will be supplied in accordance with the Standard Towing Conditions attached hereto and forming part hereof.

In the event that either of the vessels is lost enroute we shall be entitled to payment in respect of each said lost vessel the proportion of Five Thousand Five Hundred Dollars ($5,500.00) U. S., which the distance towed from Sydney to the point of loss bears to the total distance from Sydney, N. S. to Baltimore and in addition, the sum of Five Thousand Five Hundred Dollars ($5,500.00) U. S. in respect of each vessel delivered at Baltimore.

[fol. 507] We shall also be entitled to engage an American towing company to supply tug service for part of the voyage in American waters and the services of any tug so supplied shall be considered as supplied under the above mentioned terms and conditions. We or our sub-contractors will supply the necessary personnel for handling the vessels through the Cape Cod Canal.

You undertake to make payment of the above towage money immediately upon completion of the services.

Your acceptance of this letter will constitute a contract between us.

Yours very truly, Foundation Maritime Limited, E. M. Woollcombe, General Manager.

EMW/M

Accepted:

[fols. 508-510] STANDARD TOWING CONDITIONS

As Agreed Between the Shipping Federation of Canada and Eastern Canadian Tug-Boat Owners Association.

1. The Tug Company will not be responsible for any delay in supplying tug service arising from any cause whatsoever or for any loss, damages, or injuries which may be sustained in consequence thereof by the owners, charterers or operators of any vessel or craft or by any other person or persons interested therein.

2. Tug services will be supplied upon the condition that all towing, moving, shifting, docking, undocking, or other handling of a vessel or craft of any character by a tug or tugs owned or employed by the Tug Company is done at the sole risk of such vessel or craft and of the owners, charterers or operators thereof, and that the Master and crew of such tug or tugs used in the said services become the servants of and identified with such vessel or craft and their owners, and that the Tug Company only undertakes to provide motive power.

3. The Tug Company will not be responsible for the acts or defaults of the Master, or crew of such tug or tugs, or any of their servants or agents or else whosoever, nor for any damages, injuries, losses or delays from whatsoever cause arising that may occur either to such vessel or craft, or property or persons on board thereof, or to any other ship or vessel or property of any kind whether fixed or movable and the Company shall be held harmless and indemnified by the Hirer against all such damages, injuries, losses and delays, and against all claims in respect thereof.

4. Such exemption from liability shall apply regardless of whether such vessel or craft assists in the services with its own steam or power or in any other way, and irrespective of whether any employee of the Tug Company or the Master, or any of the crew of such tug or tugs is at the time of said services on board of such vessel or craft, or in command thereof.

5. The foregoing conditions shall apply to any damages, injuries or loss from whatsoever cause arising that may occur to the vessel or craft requiring the tug or tugs or to any other vessel or craft, or to any person or property on board

thereof, or to any other property whether fixed or movable, while such tug or tugs is or are in attendance upon or fast to or engaged in any manoeuvre for the purpose of making fast to, or disengaging from or proceeding clear from the vessel or craft requiring the tug or tugs, provided however that the said conditions shall not apply to loss or damage to the tug or tugs or to property on board the tug or tugs or to damages for personal injuries to or loss of life of members of the crews of the tug or tugs or persons on board thereof, unless such loss or damage or such damages for personal injuries or loss of life shall have been caused or contributed to by the fault or negligence of the vessel or craft requiring the tug or tugs.

* * * * * * *

[fol. 511] IN UNITED STATES DISTRICT COURT

LIBELLANT'S EXHIBIT NO. 2

ROYDEN WILBOUR DYKEMAN

Q. Are you a Master Mariner?
A. Yes.

* * * * * * *

Q. And how long have you been going to sea?
A. Since 1915.

* * * * * * *

[fol. 512] Q. And have you been employed by the Foundation Maritime Limited of Halifax for some time?
A. Since they came here approximately.
Q. When was that?
A. 1934.
Q. Have you been in command of tugboats or salvage vessels during that time?
A. Yes.
Q. Continuously?
A. Yes.

Q. In the year 1945, of what vessel were you the Master?
A. The "Foundation Security."
Q. What kind of a vessel was that?
A. She was—you would call her an ocean-going steam tug.
Q. And in what business was she employed?
A. Towing and salvage operations.
Q. For?
A. Foundation Maritime.

* * * * * * *

[fol. 513] Q. What was your practice, Captain, with respect to keeping a log book on the "Foundation Security"?
A. For every movement, entry is made in the log book.

* * * * * * *

Q. Were abstracts of the log book furnished to your office at Halifax?
A. Yes, at the end of every job or weekly; when we were on a station anywhere standing by, it is weekly and otherwise it is at the end of every job, abstracts were sent to office at Halifax.

* * * * * * *

[fol. 514] Q. And who was the officer of the company who had the custody of these abstracts of the log?
A. Mr. Turner.
Q. What is Mr. Turner's position with the Company?
A. He is office manager and accountant.

* * * * * * *

Q. Now, coming back, Captain, to July 1945, do you recall going to Sydney early in July—the latter part of June or [fol. 515] early in July?
A. Yes.
Q. You were Master of the —?
A. "Foundation Security."

* * * * * * *

Q. When you got to Sydney, what did you find you had to tow?

A. Two destroyers to Sandwich, Cape Cod Canal on this end.

• • • • • • •

[fol. 516] Q. I think you said, Captain, that those two destroyers were anchored in the harbour at Sydney?

A. They were at Navy mooring buoys—not their own anchors.

• • • • • • •

Q. Will you look at the page, for the purpose of refreshing your memory, and say when you — on board the "Foundation Security" arrived at Sydney bar?

A. 5:10 a.m. July 3rd.

Q. 19—?

A. 45.

Q. 1945. Speaking then, without refreshing your memory, will you say what you did after you arrived? Did you an-
[fol. 517] chor in the stream or tie up alongside?

A. Tied alongside.

Q. You tied alongside the two destroyers?

A. That is right.

Q. The destroyers, you said, were at that Navy moorings?

A. That is right.

Q. Any crew on board the destroyers?

A. No, there were watchmen there. They watched several destroyers about. There were some Navy personnel around there at the time giving us delivery of them.

Q. What did you do as far as the destroyers—did you put any equipment on board or anything of that kind?

A. The first thing we put our bawsers and bridles here between the two destroyers that they were being towed by.

Q. By the way, was it your intention to tow the destroyers in tandem?

A. Yes.

Q. That means?

A. One ahead of the other.

Q. That means one ahead of the other?

A. Yes. And the crew, under the supervision of the mate and myself, closed all the ports.

Q. Perhaps, before we get to that, will you just say what equipment you put on board the vessels—towing equipment, I mean?

A. We put this 12-inch hawser.

* * * * * * * *

Q. As a matter of fact, were there any towing hawsers on the destroyers?

A. No.

[fol. 518] Q. I see. Now, what other equipment? You mentioned something about bridles?

A. 1½-inch bridles on either end of the manila rope and cringlers on either end of the manila hawser and shackling. inch and a half wire pennants. They were approximately 120 feet long—the pennants or bridles, whatever you call them.

Q. Was this equipment put on board on the 3rd of July?

A. Yes.

* * * * * * * *

Q. On July 4th, after refreshing your memory, can you say what you did?

A. Yes, July 4th was when we got the destroyers ready for sea.

* * * * * * * *

Q. You stated July 3rd you arrived there and put the [fol. 519] equipment on board?

A. Yes, we were detained for crew on this trip, and I see now it was on July 6th.

Q. Did you do something on July 6th with respect to the destroyers?

A. Yes, the crew which consisted of two mates—

Q. That is your crew?

A. Yes, and four sailors.

Q. Two mates and four sailors?

A. Yes, closed all ports.

Q. Ports of what?

A. Port holes.

Q. Of the destroyers?

A. Yes.

Q. What else did you do?

A. Excuse me, that is six sailors, not four. And we closed all the hatches or any entrance which would lead to the holds of the ships. We closed all the doors and secured them to keep them from banging. That is about all.

Q. What about the rudders?

A. Oh yes, the rudders, which were hard over, we jacked amidship and secured them.

Q. How did you secure the rudders?

A. This was hand gear down there. We stayed it with ropes, you know, so it wouldn't move.

* * * * * * *

[fol. 520] Q. What doors did you close?

A. We closed all doors.

Q. You closed all doors, and how did you make them secure?

A. Some of them had a safety lock on them—a kind of a lever—and some of them just an ordinary door lock.

Q. Now, there are port holes shown on that photograph on the bridge?

A. None of those were open.

Q. Were any of those port holes open?

A. No, they wasn't open.

Q. What about the port holes on the sides of the vessels? What was done with them?

A. There was dozens of those open. We closed each one and made sure they were secure.

Q. How do you make them secure?

A. You shut the port and there is a bolt comes down and fits on the side of the port and there is a nut screws tight and there is a gasket around the port.

Q. Who supervised that job?

A. Myself.

Q. Did you inspect the work that was done?

A. Oh yes.

Q. On both destroyers?

A. Yes, we got one ready at a time, you see.

* * * * * * *

Q. Do you recall [illegible] he two destroyers had similar hatches and if they were closed?

A. Yes, they were the same and they was all closed.

* * * * * * *

[fol. 521] Q. Now, Captain, did you do any pumping?

A. No, no pumping.

Q. Did you inspect the destroyers for the purpose of seeing whether or not any pumping was necessary?

A. Yes, we looked in the engine room—that was the lowest part of them—and there was a little water in all of them there that was laying at the buoys in Sydney, and the watchman said they wasn't leaking. If they were making any water, they would have had to pump them there at the time they layed there.

Q. Did you satisfy yourself that the two destroyers were [fols. 522-524] in fit condition to tow before the towing commenced?

A. Yes, I satisfied myself that they were as good as could be made.

Mr. Edgerton:

I move that be stricken from the record as not responsive.

By Mr. Smith:

Q. My question was, Captain: Did you satisfy yourself that the vessels were in a fit condition to be towed?

A. Yes.

* * * * * * *

Q. Do you recall how long this work, which you have mentioned to us on July 6th—how many hours the two vessels took?

A. Five hours we was getting ready for sea.

* * * * * * *

Q. Now, you haven't mentioned the names of these destroyers. You had towed some other destroyers before these two?

A. We had six of them.

Q. But do you recall the names of these two destroyers that you were towing on the day in question?

A. "St. Francis" and "Hamilton." There was no names on them, but that is what they told us the names were.

Q. But you had numbers on them?

A. Numbers on them.

Q. I suppose you don't remember now which was ahead and which was behind?

A. No, I didn't bother my head about them. I had enough else to worry about.

* * * * * * *

[fol. 525] Q. How did they tow?

A. The first ones towed straight and the hind ones sometimes would sheer, according to the wind.

* * * * * * *

Q. Look at the abstract of log just for the purpose of saying when you arrived at Cape Cod? 3 p. m., is that it?

A. 3 p.m. July 12th arrived outside Cape Cod Canal buoy. Started taking in hawser. Made one destroyer fast alongside.

Q. Yes?

A. Started to get second hawser. Wind breezing up southwest strong. Had to let both destroyers trail astern again. This is what was going on while we were waiting for the "Peter Moran."

Q. When did the tug "Peter Moran" arrive?

A. 9:15 p.m.

Q. On what day?

A. July 12th.

Q. And did the "Moran" take way?

A. He took one destroyer and he said he would be back at 4 o'clock on the 12th a.m.

Q. When did he take the destroyer away? Did you see him take the destroyer away?

A. Yes.

Q. Before you left on your return to Halifax, had the destroyers been taken away?

[fols. 526-527] A. One. He took one, and I put the other

one in the canal. He took one and made fast on the other side of the canal, and I took one in to Sandwich and tied her up at the Dolphin and came to Halifax.

* * * * * * *

Q. What became of the equipment that you had used—your towing equipment—that you had used on the tow down?

A. We had all aboard of the "Foundation Security."

* * * * * * *

Q. And the "Moran" must have used her own gear?

A. Oh yes.

* * * * * * *

[fol. 528] Q. Now, Captain, you have mentioned that you also towed some other destroyers previously?

A. Yes.

Q. How many destroyers had you towed?

A. Four besides the "St. Francis" and "Hamilton."

Q. And were the destroyers towed in tandem?

A. The same way, yes.

Q. Were they the same kind of destroyers?

A. Yes.

* * * * * * *

Q. Where was the first tow that you made of the first two tugs in tandem—where was that from?

A. From Pictou, Nova Scotia.

Q. To where?

A. Sandwich.

Q. On that tow—the tow from Pictou—were the destroyers without crews and was the towing conducted in the same manner as you have described the towing of these two vessels from Sydney?

A. That is right, no crew on any of the tows.

* * * * * * *

Q. On that tow, did anything happen out of the ordinary?

* * * * * * *

[fols. 529-530] A. Yes, we lost a stern destroyer on that trip.

* * * * * * *

[fol. 531] Q. Captain, can you tell us what the "Security" was doing between your arrival at Sydney bar at 5:10 a. m. on July 3rd and your leaving at 12:15 p. m. on the 6th, I think?

A. Mostly we was hung up for crew.

Q. Did you do any work on the destroyers between that time?

A. We got them ready to proceed the day we left.

* * * * * * *

[fol. 532] Q. Do you know how much they were drawing?

A. No, I do not.

Q. Have you any notion?

A. No.

* * * * * * *

Q. When you left these moorings that you speak of, how were the mooring cast loose or got rid of?

A. There was wires. They was hauled aboard of the destroyers.

Q. By whom?

A. Our crew.

[fol. 533] Q. That is, some of your deck hands were aboard the destroyers?

A. Yes, getting under way.

Q. And they hauled in the wires with which the destroyers had been moored, is that correct?

A. Yes.

* * * * * * *

[fols. 534-535] Q. You said that the after destroyer would sheer one way or the other, depending on the wind?

A. Yes.

* * * * * * *

[fol. 536] Q When you left Sydney, do you know whether there was any equipment on board these vessels for sounding fog signals?

A. No, there was nobody to sound them.

Q. There was no one to use anything, anyway?

A. No, they were dead.

Q. But do you know whether there were any mechanical fog horns on there?

A. I don't know.

• • • • • • •

Q. What was on them by way of lights when you left Sydney?

A. There was quite a few spare lights around in the lamp lockers. We used our own.

Q. You used your own?

A. Yes.

Q. What did you use, oil lighters?

A. Yes.

Q. What type of lights?

A. I don't know what you would call them you use all around the horizon—white lights.

• • • • • • •

[fol. 537] Q. And you put this I call type of all around white light all around the destroyer when you left Sydney?

A. Yes.

Q. And did you light them at that time?

A. Yes.

Q. They burned constantly, did they?

A. No, some trips there would be one burned out.

Q. I am referring to this particular trip?

A. I couldn't say that.

Q. Did any of your crew board the destroyers from the time you left Sydney on that trip until you got to the Canal?

A. No.

• • • • • • •

Q. Are you familiar with Article 5 of the International Rules for Preventing Collisions?

A. Yes.

Q. And can you tell us what they require for lights on towed vessel?

A. The same as a steam vessel under way, with the exception of the white light, which she shall never carry.

Q. So that the white lights, which were actually carried, were not in compliance with the rules for towed vessels, were they?

A. That is right.

Q. Did you take those lanterns off when you left the vessels in the Canal?

A. Yes.

* * * * * * *

[fols. 538-539] Q. In your Direct Testimony, you mentioned the fact that the towing gear that the "Peter Moran" used was a lot lighter than yours?

A. Right.

Q. She was a smaller tug; she used a small hawser, didn't she?

A. Yes.

* * * * * * *

[fol. 540] Q. Are you familiar with the arrangement under which those vessels were towed?

[fols. 541-542] A. No.

Q. Do you know anything about that at all?

A. No.

Q. Do you know what arrangement, if any, was made between your employer and the "Moran" people about splitting up the towing?

A. Now, there was an arrangement made, but I couldn't say what they were.

Q. You don't know that?

A. No.

* * * * * * *

[fols. 543-549] Q. You didn't leave any gear at all for the "Moran"?

A. Just the mooring line that was aboard them for the canal.

Q. There were no other lanyards, lanterns or lights, were there?

A. There were lanterns aboard of her. I didn't know what they were; I didn't pay any attention.

• • • • • • •

[fol. 550] IN UNITED STATES DISTRICT COURT

LIBELLANT'S EXHIBIT 3

IRA F. GEORGE, JR.,

[fol. 551] Q. In July of 1945 what was your occupation?

A. I was Master of the Peter Moran.

• • • • • • •

[fol. 552] Q. And by whom are you now employed?

A. Moran Towing & Transportation.

Q. And have you been continuously employed by them, and if so, for how long?

A. About three years and a half.

Q. How long did you serve as the Master of the Peter Moran?

A. I was Master I think it was 1944 I went there; about a year and a half I believe with the Peter Moran.

• • • • • • •

Q. Captain, I direct your attention now to the beginning of the voyage on which this accident occurred and ask [fol. 553] you when and where you picked up a tow which you took on this voyage?

A. We picked this tow up in Cape Cod Bay, on the east end of Cape Cod Canal. We brought the tow through the canal ourselves.

Q. And what did the tow consist of?

A. Two destroyers.

• • • • • • •

[fol. 554] Q. In connection with the making up the tow did you yourself go on board the I-24?

A. Yes, I was aboard both destroyers coming through the canal.

Q. Did you make any examination of them as to their condition for towing?

A. Yes. They were in good shape and seaworthy condition.

Mr. Edgerton: I object to that and move that it be stricken.

Q. Did you look into the hold of the I-24 to see whether she was leaking or not?

Mr. Edgerton: I object as calling for a conclusion.

A. I was below in the I-24 and the other one too, and I didn't see any water or evidence of leaks.

Q. And what was your opinion as to the condition of the I-24 with respect to the voyage you were about to take?

Mr. Edgerton: I object to the question.

A. For the voyage we were going to take they were in seaworthy condition.

Mr. Edgerton: I move to strike out the answer until it [fols. 555-556] appears what voyage they were going to take them on.

Q. What was the voyage, Captain?

A. From Cape Cod Canal to Baltimore, Maryland.

• • • • • • •

Q. What length of hawsers were you using?

A. A tug's hawser for 250 fathom, and the intermediate hawser for 200 fathom.

• • • • • • •

[fols. 557-558] Q. Did you personally supervise the rigging of these hawsers in the arrangement that you described?

A. Yes, sir.

• • • • • • •

[fol. 559] Q. Who furnished these hawsers?

A. The tug.

Q. The Peter Moran?

A. Yes, that is right.

[fols. 560-565] Q. What was done upon leaving the west end of the canal with respect to placing lights on the destroyers?

A. The lights were lit and put up when we got under way with the tow at the west end of the canal, and put on the hawsers.

Q. What lights were placed on the first destroyer?

A. We had one white light.

Q. And where was that light placed?

A. On the yardarm of the mast.

* * * * * * *

Q. What lights were placed on the I-24?

A. We had two white lights, one on each side of the yardarm.

Q. Were those lights placed under your supervision?

A. Yes, sir.

* * * * * * *

[fol. 566] Q. What lights was the tug displaying?

A. Regulation towing lights.

* * * * * * *

A. (Continuing) Red and green.

Q. Describe the regulation towing lights.

A. Red and green lights. And three towing lights on the forward mast.

[fols. 567-579] Q. What kind of lights are they? I mean oil or electric?

A. Electric lights.

* * * * * * *

Q. Was the tug displaying any other lights than the ones you have described?

A. We had two red lights.

Q. Where were they displayed?

A. They were displayed—they were hung between the foremast and the stack; they have a stay there.

* * * * * * *

[fols. 580-583] Q. How many did you have all together in your crew?

A. We carried fifteen.

* * * * * * *

[fol. 584] Q. Where did you have the one you had? Alongside?

A. We had him alongside, and then we hooked him back of the hawsers and connected him up.

Q. Who rigged the intermediate hawser?

A. The tug's crew.

Q. Your deckhands and mates?

A. Yes.

Q. Did your deckhands and mates also rig the hawser between the Peter Moran and the I-93?

A. Yes.

Q. There were no crews on either of these destroyers?

A. No.

Q. There was no steam either?

[fol. 585] A. No.

* * * * * * *

Q. Where was the I-24, Captain, when you were aboard her?

A. I was aboard her when we was coming through the canal.

Q. And at that time you were towing her alongside?

A. Alongside.

* * * * * * *

[fol. 586] Q. The Peter Moran supplied both the towing hawser and the intermediate hawser, didn't she?

A. That is right.

Q. And she supplied the pennants that were used there?

A. Yes.

Q. Did the boats have anything further on them in the way of lights or gear of that sort?

A. Well, they had some old lights and duffle around.

• • • • • • •

Q. Did you go through the pilot houses and bridge deck space on the boats?

A. Yes.

Q. What did you find there in the way of gear?

[fols. 587-589] A. Very little. She had been stripped pretty well.

Q. Did they have any lights, that is, lanterns?

A. They had some old lanterns, but I think we used some of ours.

Q. Do you know whether or not the lanterns they had were oil or electric?

A. They were oil.

Q. And they had no electric power?

A. No electric power.

Q. The lights that you actually used were those supplied by the Peter Moran, is that correct?

A. I believe some were supplied by the Peter Moran and some was from the destroyers.

Q. Can you tell me which lights were supplied by the destroyers?

A. No, sir.

Q. Have you any recollection about that at the present time?

A. No, sir.

Q. So that when you say that you think some were supplied by the Peter Moran and some by the destroyers; is that just guessing on your part?

A. Well, yes, more or less, I guess.

• • • • • • •

[fols. 590-598] Q. Did you know anything, Captain, about the arrangement between the Peter Moran and these destroyers, or their owners or agents at the time?

Mr. Skeen: That is objected to.

A. No, I do not know of anything.

Q. You do not know anything about that at all, is that right?

A. No, sir, I do not.

Mr. Skeen: Strike out the objection.

Q. Did you start right out from Wing's Neck on your long hawsers?

A. Yes.

Q. There was no other way you could do it?

A. No other way.

Q. There was nobody aboard to handle any lines?

A. That is right.

* * * * * * *

[fol. 599] Q. You knew, Captain, when you left Wing's Neck, that there was no way of any fog signals being sounded on these destroyers?

A. Yes, that is right.

Q. And you knew also going outside of Block Island and Montauk that you were going to cross the traffic lanes through the Long Island Sound and Block Island Sound, didn't you?

A. Yes.

Q. And you put up these two red lights because you knew you were going to be a menace to traffic coming through there?

Mr. Skeen: That is objected to as to form and leading.

[fol. 600] A. Well, not exactly a menace, but well, as a warning to keep away.

Q. You knew you had a long tow?

A. Yes.

Q. About a half a mile?

A. Yes.

Q. An unwieldy tow?

Mr. Skeen: Objected to.

A. Not exactly.

Q. You knew the vessels couldn't be steered?

A. Yes.

Q. And you knew they might sheer one way or the other?
A. That is right.
Q. And you knew if you made a sharp change of course they would go ahead on their old course before they felt the strength of the hawser?
A. Yes.
Q. And that would be more so of the tail boat than the head boat with nothing behind her?
A. Yes.
Q. And she might go either way, is that right?
A. Yes, sir.

* * * * * * *

[fol. 601] Q. You knew these vessls were carrying improper lights for international waters, didn't you?

Mr. Skeen: Objected to.

A. I knew that was not the right lights for vessels being towed.
Q. Either in international or inland waters, is that right?
A. Yes.
Mr. Skeen: Same objection.

* * * * * * *

Q. You didn't expect to have anybody on board the two destroyers until you got into the Delaware River?
[fols. 602-908] A. There was not any crew.

Mr. Skeen: Objected to.

Q. You did not expect to have anyone, did you?
A. Well, I expected—we would fix the lights—
Q. Will you answer the question?
A. I do not understand what you mean.
Q. When you left Wing's Neck for Baltimore with the two destroyers in tow did you expect to have any crew aboard the destroyers until you got into the Delaware River?
A. No crew on them, no.
Q. Did you ever tow any destroyers before this?
A. That is the first destroyers.

* * * * * * *

[fol. 909] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

IN ADMIRALTY

No. 2757

BOSTON IRON & METAL COMPANY, Libellant,

v.

SS "WINDING GULF", her engines, boilers, etc., and MASSACHUSETTS TRUSTEES OF EASTERN GAS & FUEL ASSOCIATES

FINDINGS AND OPINION ON DAMAGES—Filed March 22, 1949

CHESTNUT, District Judge:

This was an admiralty collision case in which an interlocutory decree of the court was filed September 5, 1947, after the filing on June 10, 1947 of an extended opinion of court, which is reported at 72 F. S. 50. The decree provided the damages should be divided. After long and unsuccessful negotiations between the parties to stipulate for the amount of damages, the question as to the amounts was recently submitted to the court for decision. As appears from the opinion heretofore filed, the libellant's vessel, an old and obsolete destroyer purchased for scrap value by the Boston Iron & Metal Company, was sunk and became a total loss as a result of the collision. The other ship involved, the Winding Gulf, was damaged by the collision. The principal controversy over the amount of damages sustained by the respective ships was with regard to the valuation to be placed on the obsolete destroyer known as the "I-24". From the evidence submitted to the court I make the following finding of facts.

1. At the time of the collision the Destroyer I-24 was [fol. 910] owned by Boston Iron and Metal Co., which corporation has since been renamed Boston Metals Co. (There being no significance to the time of change of name as to any issue here involved, the present shorter name is hereinafter used for purposes of convenience).

2. The I-24 was first commissioned by the United States Navy in 1919 and was originally named "Bancroft". She

was one of the fifty destroyers traded to the British before our entry into the war. After having been delivered to the British, she was renamed "St. Francis" and became a vessel of the Royal Canadian Navy.

3. Boston Metals Co. purchased the I-24 on July 2, 1945, from E. Frankel & Sons of Toronto for $6591 U. S. currency in her then condition at Sydney, Nova Scotia.

4. The I-24 was purchased exclusively for scrapping and could not under the terms of purchase be put to any other use.

5. As as result of the collision, the I-24 sank a short time thereafter and became a total loss.

6. The I-24 had been towed from Sydney to the point of her loss at an expense to Boston Metals Co. of $3,048.91.

7. For some time prior to July 2, 1945, and since said date, Boston Metals Co. has been engaged in the scrap iron and steel business dealing principally with the dismantling of ships (R. 24).

8. The I-24, at the time of her purchase by Boston Metals Co., was one of a group of six similar overage destroyers purchased by said corporation from said E. Frankel & Sons (R. p. 26).

9. The names of said six destroyers, amounts paid therefor, dates of their purchase, of their arrival at Baltimore [fol. 911] and of the completion of their dismantling by Boston Metals Co. are respectively as follows (R. pp. 26, 27):

Name	Price Paid	Towing Paid	Dates Purchased	Dates Arrived	Dates Dismantling Completed
Salisbury	$7000		10/12/44	5/31/45	2/28/46
Mansfield	7000		10/12/44	5/31/45	10/15/46
Buxton	6591		6/ /45	7/11/45	12/31/46
Annapolis	6591		6/ /45	7/11/45	6/ /46
Hamilton	6591		7/ 2/45	8/23/45	12/31/45
St. Francis	6591	*3048 91	7/ 2/45	LOST	

*Apportioned to place of sinking.

10. The said six destroyers were purchased over a period of time from October 1944 until July 1945, as a result of negotiations carried on by Mr. Morris Shapiro of Boston Metals Co., who made a visit to Canada some time in 1944, and made arrangements with Mr. Egmont Frankel whereby Boston Metals Co. agreed to pay E. Frankel & Sons a cer-

tain commission on any of these vessels on which they were the successful bidder from the Canadian Government; and as E. Frankel & Sons acquired these vessels, they in turn sold them to Boston Metals Co. at the bid price plus their commission (R. p. 26).

11. Between June and November 1945, Boston Metals Co. bid on two offerings of submarines at the Philadelphia Navy Yard but was not the successful bidder on either occasion (R. p. 53).

12. In November 1945, Boston Metals Co. submitted bids on fifteen destroyers offered by the United States Navy then lying at Cape May, New Jersey, and it was awarded said fifteen destroyers on December 6, 1945, at a price of $8,777. each, as is, where is (R. p. 53, p. 47).

13. Of said fifteen destroyers, at least seven were of the same original class as the I-24 (R. p. 71, pp. 75-6).

14. Boston Metals Co. paid approximately $750. per destroyer to tow each of said fifteen destroyers from Cape May, New Jersey, to its anchorage at Baltimore (R. p. 47).

[fol. 912] 15. Said fifteen destroyers began to arrive at Boston Metal Co.'s anchorage at Baltimore in the very early part of 1946 (R. p. 67).

16. Boston Metals Co. stored all destroyers and other vessels purchased for scrapping at an anchorage about one-half mile from its yard at Baltimore, where such vessels remained until they were taken to its yard for scrapping (R. p. 28).

17. Boston Metals Co. has, since its purchase of the I-24 built up and maintained a stockpile of destroyers and other metal vessels at Baltimore to be scrapped.

18. When the first of the fifteen destroyers awarded to Boston Metals Co. by the United States Navy on December 6, 1945, arrived at its anchorage at Baltimore, Boston Metals Co. was still working on dismantling some of the six Canadian destroyers above mentioned (R. p. 67).

19. There are still, as of February 1, 1949, in Boston Metal Co.'s anchorage at Baltimore some of the fifteen destroyers purchased by it from the United States Navy at Cape May, N. J. (R. p. 71).

20. The Boston Metals Co. claims the value of the destroyer at the time of its sinking was $46,449.32 as shown on

Libellant's Ex. No. 1. In this exhibit the estimated cost of dismantling the destroyer is given at $6.45 per gross ton for direct labor on 1123 gross tons but there is no detailed evidence as to the manner in which the estimate of $6.45 per gross ton for direct labor was arrived at except that it results from an estimate. Similarly the estimate of $3621.67 to cover overhead charges allocable to dismantling was an estimated percentage figure. Said figure of $46,449.32 is without deduction for the cost of the destroyer to the Boston Metals Co. and the towage expense paid by it to point of sinking.

[fol. 913] 21. At the time of collision the destroyer had no value as a vessel, having been bought for the sole purpose of conversion to metal scrap and having been sold on the condition that she be so converted.

22. Boston Metals Co. has for many years past been engaged in the ship breaking business and converting vessels to scrap. This business is a specialty with only a comparatively small number of companies engaged in it. It is necessary to buy vessels for conversion (such as obsolete destroyers of the type of I-24) as the opportunity occurs, in order to maintain an inventory.

23. Prior to acquiring the destroyer I-24 and five other vessels, the Boston Metals Co. had embarked on a long range program of establishing an inventory of vessels to be used for scrap and the said program involved the purchase of as many such vessels as the Company could acquire when offered for sale. The purchases of obsolete naval vessels both before and after the loss of the I-24 were made in connection with its prior determined intention to acquire as large an inventory as possible. It is not ordinarily possible for any Company in the ship breaking industry to buy obsolete vessels except as they are offered for sale at the discretion of the United States Government or the Navy Department.

24. In connection with its business the Boston Metals Co. has found it necessary to and did determine the approximate amount of the various ferrous and non-ferrous metals contained in a destroyer of the class and type of the I-24. These amounts are approximately shown in the libellant's Ex. No. 1, and the I-24 was acquired by the Boston Metals

Co. because of the prior determined amount of scrap contained in the vessel.

25. The price per ton on July 13, 1945 of the scrap metal contained in the I-24 were established by Regulations of the Office of Price Administration and such scrap was actually sold by libellant and others at said prices during July 1945. The prices shown on the Exhibit are the OPA prices pre- [fol. 914] vailing in July 1945 for scrap metal. The price of Thornycroft tubes and white metal as indicated on the Exhibit are determined by actual sales of such materials made during July 1945.

26. As a result of the collision the respondent and cross-libellant, Massachusetts Trustees of Eastern Gas & Fuel Associates, the owners of the steamer Winding Gulf, had extended repairs made in amounts aggregating $18,657.04, but there is an additional possible element of damages to the Winding Gulf with regard to the detention of the ship pending repairs. The ship was under charter to an agency of the United States Government and there is still an open and unsettled question between the Government and the respondent with regard to what net amount of damages may hereafter be determined to have accrued by virtue of the detention. Counsel are still negotiating with regard to this item, and have requested that there be no finding made on that particular point at the present time.

27. As an ultimate finding of fact, I find that the fair and reasonable value of the destroyer I-24 at the time of the collision and her total loss was $15,000.

Discussion

There is a very wide difference between the parties to this case with respect to the damage sustained by the libellant in the loss of the destroyer. Her owner contends that her value and consequent damages amounted to $46,449.32. Contrasted with this the owners of the Winding Gulf contend that the fair value of the destroyer was only $9,639.91, consisting of her cost in Nova Scotia plus expense of transporting her to the point of collision and loss. The determination of the value of the destroyer is difficult because it is impossible to find from the evidence any clear and definite sum that would reflect her market value at the time. Indeed

the destroyer had no market value. While classed as a ship [fol. 915] in the admiralty law, it is clear that she had no market value or indeed any value intrinsically as a ship. Her only value was what would result from the scrap value of her metal parts when broken up and a sale of the scrapped material at market prices, from which should be deducted the cost and expense in that operation. In this connection counsel for her owner refers to the only adjudicated case which has been called to my attention which involved a somewhat similar problem of valuation, where the court had the problem to value a dead ship that had no market value as a vessel. The C. H. Northam, 181 F. 985 (D. C. Mass. 1909). In that case the court said:

> "it can hardly be said that the ordinary rule for ascertaining the market value of a vessel is possible of application in her case. Evidently in the ordinary market for vessels she had no value, for the reasons stated by the master, and, instead of directing the inquiry to the market value, it was necessary to resort to other methods of appraisal. The master has taken the total value of the material contained in her, has deducted the total expense of breaking her up and getting the material out, and has allowed the balance of $413.79, then remaining, as her value for the purposes of this case. I am unable to see why this method of arriving at her value is not proper and just under the circumstances."

This case is persuasive in principle but it cannot be applied here to the extent and in accordance with the particular figures contained in the libellant's exhibit No. 1 which itemizes the estimated quantities of scrap metal which would have been realized from breaking up the ship and a sale thereof at OPA prices prevailing in July 1945, which produces a total of $57,314.34, from which is deducted the estimated cost of dismantling and of overhead expense in all aggregating $10,865.02, and produces a net balance of $46,449.32. Assuming the correctness of the stated market prices applied to the estimated quantities, it still appears that the cost of dismantling and the overhead cost thereof to the defendant is hardly more than an estimate, and in addition it seems clear enough that the net figure obtained must neces-

sarily have included the owner's profit in the operation. I am not sure but that there would have been other expenses [fol. 916] possibly in the nature of general selling expenses, which would have to be deducted from the proceeds of the sale of the scrap at market prices. I think, therefore, the evidentiary value of the exhibit must be given only the limited weight of indicating that the value of the destroyer at the time of the loss was substantially greater than her cost of purchase and expense of transportation, the latter apportioned to the place of loss. And in this same connection there was some evidence to the effect that the general experience of the business was that a destroyer of this type when bought for scrapping generally produced about $18,000 more than her cost. It seems to be well settled on the authorities that in the case of a total loss of a vessel as such the rule is well established that the measure of the owner's loss is the market value of the vessel at the time and place of the loss if this can be determined. The Umbria, 166 U. S. 404,421; Standard Oil Co. v. Southern Pacific Co. 268 U. S. 146,155.

It is apparently agreed by counsel for both parties in this case that the real value of the destroyer at the time of loss was only such value that she had for scrapping. And in this connection the proctor for the Winding Gulf invokes the rule of damages applicable to loss of cargo which is generally held to be the market (invoice) value at the port of shipment plus the cost of insurance, freight, loading and other similar expenses necessarily incurred in moving the goods from point of shipment to the collision, but without allowance for anticipated profits. The Scotland, 105 U. S. 24, 35; Smith v. Condry, 1 How. (42 U. S.) 28, 34; Standard Marine Ins. Co. v. Scottish Met. Co. 283 U. S. 284, 288; Guibert v. The British Ship George Bell, 3 F. 581, 584 (D. C. Md.)

Accordingly counsel for the Winding Gulf argues that the value of the destroyer was limited to her cost in Sydney, Nova Scotia, plus the apportioned towage expense to the point of collision, to wit, $9,639.91. But I am not satisfied [fol. 917] that this limited basis for valuation is the correct one to apply in this case. The rule which I think should be applied in this case is well stated by Mr. Justice Butler

for the Supreme Court in Standard Oil Co. v. Southern Pacific Co. supra, 268 U. S. 155, 156:

> "It is fundamental in the law of damages that the injured party is entitled to compensation for the loss sustained. Where property is destroyed by wrongful act, the owner is entitled to its money equivalent, and thereby to be put in as good position pecuniarily as if his property had not been destroyed. In case of total loss of a vessel, the measure of damages is its market value, if it has a market value, at the time of destruction. The Baltimore, 8 Wall. 377,385. Where there is no market value such as is established by contemporaneous sales of like property in the way of ordinary business, as in the case of merchandise bought and sold in the market, other evidence is resorted to. The value of the vessel lost properly may be taken to be the sum which, considering all the circumstances, probably could have been obtained for her on the date of the collision; that is, the sum that in all probability would result from fair negotiations between an owner willing to sell and a purchaser desiring to buy."

While the above stated rule was applied by the court in the case of a ship, which apparently had no market value as such, the rule is not materially different, so far as we are here concerned, from the rule that is customarily applied in federal land condemnation cases where the jury, at least in this district, is currently told in part, at least in cases where no definite market value is obtainable, that they should allow such value as they find on the best evidence in the case to be the sum which a willing buyer would pay to a willing seller. See also recent land valuation cases in this Fourth Circuit, United States v. 25.406 Acres of Land in Arlington County, Virginia, decided February 21, 1949; United States v. Powelson, 138 F. 2d 343.

In this case the destroyer had no value as a ship, and I think it would be unfair and unreasonable in determining her value as scrap to limit the valuation, as counsel for the Winding Gulf contends, to the mere basis of the cost and expense incurred by the owner, and thus treat this peculiar [fol. 918] kind of property merely as cargo to be valued

at invoice value of cost plus expenses. Indeed, as pointed out by Judge Parker in United States v. 25.406 Acres of Land, supra, market value in such a case is a mere hypothetical concept. While the valuation as exactly finally determined must be more or less arbitrary, as indeed jury verdicts necessarily generally are in land condemnation cases, it seems fairly clear to me that the fair value of the destroyer was more than the mere cost to the owner up to the time and place of the loss. Nor is the cost of replacement an important factor in this case by reason of the peculiar nature of the owner's business, the purposes for which the destroyer was bought. The particular business is a specialty and its success depends very largely on the "know how" of the proprietor with respect to both the opportunity to purchase at all and the price to be paid. This "know how" comes only from previous extended business experience, organization and practical affairs. The peculiar kind of property which is dealt with is not something that is commonly available in the way of ordinary business as in the case of merchandise bought and sold in the market. It is therefore necessary to resort to other criteria and factors to determine fair value in this case. Neither the cost of construction nor reconstruction is of any particular value in this case. No doubt the destroyer when originally built cost the United States more than $1,000,000; but by nature it apparently was of comparatively little value in 1945 to the then owner from whom the Boston Metals Company bought it. The best that can be done by the valuer is, as Mr. Justice Butler said in the Standard Oil Case, supra, to determine as the value "the sum that in all probability would result from fair negotiations between an owner willing to sell and a purchaser desiring to buy." And as he later said in the same connection (p. 156):

> "It is to be borne in mind that value is the thing to be found and that neither cost of reproduction new, nor that less depreciation, is the measure or sole guide. The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but [fol. 919] there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

In applying this rule it seems clear to me that to the owner this destroyer at the time of loss had a value substantially greater than its cost to the libellant. As a practical test I think the evidence fairly leads to the view that considering all the relevant facts some person engaged in a similar business would fairly have been willing to pay for the destroyer as an entity at the time and place of loss substantially more than what it had cost the owner up to that time. It must be remembered that the purchase was made by one skilled in the particular business taking advantage of a particular opportunity not often afforded, and resulting from skill and knowledge of when, why and how to buy. Or, in other words, it may be said that the evidence as a whole fairly indicates that in the purchase the owner made a very good bargain and is entitled under the circumstances of the loss to have the damages fixed at a sum which would fairly pecuniarily reimburse him for the loss incurred.

Respondent and cross-libellant contends that an award to the libellant of more than the cost of the destroyer (to the libellant) and of the towage would be tantamount to an award of profits and that profits are not a proper element of damages. This contention results from too slavish an application of the rule of damages applicable to lost merchandise and fails to recognize the important distinction between value and profits. Value reflects an object's worth as of a certain past or present date, without regard for what it would or might be worth at a future date in a changed economic situation. This latter element is the profit element (which, when applicable, is only one element in the measure of damages) and has no application when the correct and only element and measure of damages is value at the present or a past date. The fact that the value of an article is more than its initial cost does not amount to an award of profits, and the difference cannot be so denominated. This increase results from the owner's skill [fol. 920] and perspicacity and from changes in the economic situation and is a known or ascertainable fact based on events in the past and is not an estimation or guess as to what will or might occur in the future. Mere repayment of what the owner has expended will not make him whole (the purpose of any measure of damages) when the lost

item cannot be replaced for what he expended to purchase it.

Counsel for the Winding Gulf emphasizes the fact in the evidence that some months after the loss of the particular destroyer, the Boston Metals Company also became the successful bidder for other destroyers of approximately the same metal tonnage at a cost of less than $10,000 each. But while I have given weight to this fact in the whole problem of valuation, I do not think it constitutes of itself an absolutely limiting factor because, as pointed out, the opportunity to buy materials of this kind is sporadic and uncertain as to time and place. Furthermore, another fact in evidence is that the success of the particular scrapping business depends not only on the application of experienced judgment as to prices to be paid and other prices bid, but on comparatively limited opportunities to buy at all, and the success of the business, therefore, depends, to some extent at least, upon the quantity of purchases possible at desirable prices. The final result is, and I have concluded, that the fair value of the destroyer at the time of the loss and the consequent damages for her loss should be fixed at $15,000.

W. Calvin Chesnut, U. S. District Judge.

[fol. 921] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

No. 2757

BOSTON IRON & METAL COMPANY, Libelant

v.

SS WINDING GULF, her engines, boilers, etc., and MASSACHUSETTS TRUSTEES OF EASTERN GAS & FUEL ASSOCIATES

CHARLES FRANCIS ADAMS, etc., Trustees of Eastern Gas & Fuel Associates

v.

BOSTON METALS COMPANY, formerly named BOSTON IRON & METAL COMPANY

FINAL DECREE—Filed February 18, 1953

IN ADMIRALTY

Whereas, an Interlocutory Decree was heretofore filed herein on or about September 5, 1947, providing for the equal division of the damages sustained by the SS WINDING GULF, and the damages sustained by reason of the loss of the Destroyer I-24, resulting from the collision of July 13, 1945, near Buzzards Bay, Massachusetts; and

Whereas, the Court was subsequently requested by the respective parties to determine the amount of their respective damages; and

Whereas, after testimony and arguments of counsel, the [fol. 922] Court rendered and filed herein its opinion dated March 22, 1949, holding (a) as an ultimate finding of fact that the fair and reasonable value of the Destroyer I-24 at the time of said collision and her total loss was Fifteen Thousand Dollars ($15,000.00); and (b) that as a result of said collision the owner of the SS WINDING GULF had extensive repairs made in amounts aggregating Eighteen Thousand Six Hundred and Fifty-Seven Dollars and Four

Cents ($18,657.04), exclusive of damages for detention pending repairs; and

Whereas, proctors for the SS WINDING GULF requested at the time of said hearing before the Court on the question of damages that a determination of the amount of damages sustained by her owners by reason of her being detained pending repairs be deferred to a future date; and whereas, proctors for the SS WINDING GULF and her owners have now informed the Court that no claim therefor will be asserted; and

Whereas, the Court has now been requested by proctors for both parties to enter its Final Decree herein in accordance with the said Interlocutory Decree of September 5, 1947, as to liability, and in accordance with its said findings and opinion of March 22, 1949, as to damages;

Now, therefore, it is this 18 day of February, 1953, by the United States District Court for the District of Maryland, in Admiralty,

Adjudged, Ordered and Decreed:

1. That Boston Metals Company (formerly named Boston Iron & Metal Company) sustained damages arising out of the loss of the Destroyer I-24 in the amount of Fifteen Thousand Dollars ($15,000.00) as heretofore determined by [fol. 923] the Court under said date of March 22, 1949, together with interest thereon at the rate of six per cent (6%) per annum from November 14, 1945 (the date of the filing of the Libel herein), to September 5, 1947 (the date of said Interlocutory Decree).

2. That Charles Francis Adams, et al, Massachusetts Trustees of Eastern Gas and Fuel Associates, owners of SS WINDING GULF at the time of the collision referred to in the pleadings, sustained damages as a result of said collision in the amount of Eighteen Thousand Six Hundred and Fifty-Seven Dollars and Four Cents ($18,657.04) as heretofore determined by the Court under said date of March 22, 1949, together with interest at the rate of six per cent (6%) per annum from November 14, 1945 (the date of the filing of the Libel herein), to September 5, 1947 (the date of said Interlocutory Decree).

3. That said Massachusetts Trustees of Eastern Gas

and Fuel Associates recover of and from said Boston Metals Company one-half (½) of the difference between their respective damages as aforesaid, viz., the amount of One Thousand Eight Hundred and Twenty-Eight Dollars and Fifty-Two Cents ($1,828.52), together with interest thereon at the rate of six per cent (6%) per annum from November 14, 1945, to September 5, 1947, in the amount of One Hundred and Ninety-Eight Dollars and Seven Cents ($198.07), a total of Two Thousand and Twenty-Six Dollars and Fifty-Nine Cents ($2,026.59), together with interest on said last named amount at the rate of six per cent (6%) per annum from March 10, 1953, until paid.

4. That no costs be awarded to any party as against any [fols. 924-937] other party to these proceedings.

5. That unless said recovery of said Massachusetts Trustees of Eastern Gas and Fuel Associates against said Boston Metals Company in the amount of Two Thousand and Twenty-Six Dollars and Fifty-Nine Cents ($2,026.59), as above provided, be paid on or before March 10, 1953, said Massachusetts Trustees of Eastern Gas and Fuel Associates may have execution against said Boston Metals Company and against its goods, chattels and lands forthwith to satisfy this Decree.

6. That all stipulations, if any, heretofore filed by any of the parties to these proceedings be cancelled and discharged of record.

W. Calvin Chesnut, United States District Judge.

Approved as to Form:

John H. Skeen, Jr., Skeen, Wilson & Coughlin, Proctors for Boston Metals Company, Libelant and Cross-Respondent. Niles, Barton, Yost & Dankmeyer, Bingham, Dana & Gould, Proctors for Massachusetts Trustees of Eastern Gas & Fuel Associates, Cross-Libelants and Respondents.

[fol. 938] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6637

BOSTON METALS COMPANY, Formerly Named Boston Iron and Metal Company, as Owner of the Canadian Destroyer "St. Francis", Appellant,

versus

S/S "WINDING GULF" and MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES

Appeal from the United States District Court for the District of Maryland, at Baltimore

CHRONOLOGICAL LISTING OF DOCKET ENTRIES

June 23, 1953, record on appeal filed and cause docketed.

Same day, original exhibits certified up.

Same day, appearance of John H. Skeen, Jr., entered for the appellant.

June 25, 1953, appearance of Theodore R. Dankmeier entered for the appellees.

July 9, 1953, appearance of Charles S. Bolster entered for the appellees.

September 19, 1953, appearance of Eugene M. Feinblatt entered for the appellant.

October 20, 1953, brief and appendix for appellant filed.

November 6, 1953, brief and appendix for appellees filed.

November 7, 1953, reply brief and appendix for appellant filed.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—Dated November 11th, 1953, Omitted in Printing

[fol. 939] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6637

BOSTON METALS COMPANY, Formerly Named Boston Iron and Metal Company, as Owner of the Canadian Destroyer "St. Francis", Appellant,

versus

S/S "WINDING GULF" and MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, Appellees

Appeal from the United States District Court for the District of Maryland, at Baltimore. In Admiralty.

Before Parker, Chief Judge, and Soper and Dobie, Circuit Judges

OPINION—Filed January 4, 1954

John H. Skeen, Jr. (William A. Skeen and Eugene M. Feinblatt on brief) for Appellant, and Charles S. Bolster (Theodore R. Dankmeyer, Seymour P. Edgerton, Bingham, Dana & Gould, and Niles, Barton, Yost & Dankmeyer on brief) for Appellees.

SOPER, Circuit Judge.

A collision on the night of July 12, 1945 at sea outside the southernmost end of Buzzards Bay, Massachusetts, between the steam collier Winding Gulf and an obsolete destroyer which formerly belonged to the United States and was then in tow of the tug Peter Moran, caused damages to the ship and the total loss of the destroyer. On November 14, 1945 Boston Iron and Metal Company, a Maryland corporation which owned the destroyed, filed a libel against the ship and her owners in the District Court of Maryland. Thereupon Massachusetts Trustees of Eastern Gas and Fuel Associates, a voluntary association organized under the laws of Massachusetts, filed a claim to the ship as owners thereof and also filed a cross libel in personam against Boston Metals.

The District Judge held upon the trial of the case that the ship was in fault in not changing her course or speed, and [fol. 940] that the owner of the destroyer was at fault in respect to lights and absence of crew on the destroyer, and that both faults contributed to the collision, and accordingly entered an interlocutory decree for division of damages. See the opinion of Judge Chesnut in The St. Francis, 72 F. Supp. 50.* The judge subsequently found that Boston Metals had suffered damages in the sum of $15,000 for the loss of the destroyer and that Massachusetts Trustees had suffered damages for injury to the ship in the sum of $18,657.04, and entered final judgment in favor of Massachusetts Trustees in the sum of $1,828.52 with interest. See *Boston Iron & Metals Co.* v. *S. S. Winding Gulf*, 85 F. Supp. 896.

Boston Metals was held liable for the faults of the destroyer although she was a dead ship unmanned and without motive power and was being towed by the tug Peter Moran when the collision took place. Ordinarily the faults of navigation of the tow under such circumstances could not be imputed to the owners of the tow but only to the tug. *Sturgis* v. *Boyer*, 24 How. 110; *The Eugene F. Moran*, 212 U. S. 466; *The John D. Rockefeller*, 4 Cir. 272 Fed. 67. In this case, however, there was a special form of contract between Boston Metals, the owner of the destroyer, and the Foundation Maritime, Ltd., a Canadian corporation which agreed to supply the tug for the towage of the destroyer and an accompanying ship from Sydney, Nova Scotia, to Baltimore, Maryland, for $11,000, with the understanding that the services of the towing company would be supplied in accordance with the Standard Towing Conditions attached to and made a part of the contract as follows:

> "2. The services will be supplied upon the condition that all towing, moving, shifting, docking, undocking or other handling of a vessel or craft of any character by a tug or tugs owned or employed by the Tug Com-

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* The destroyer, originally called the U. S. S. Bancroft, was one of fifty destroyers transferred to the British early in World War II, and was named the St. Francis and operated by the Canadian Government.

pany is done at the sole risk of such vessel or craft and of the owners, charterers or operators thereof, and that the Master and crew of such tug or tugs used in the said services become the servants of and identified [fol. 941] with such vessel or craft and their owners, and that the Tug Company only undertakes to provide motive power.

3. The Tug Company will not be responsible for the acts or defaults of the Master, or crew of such tug or tugs, or any of their servants or agents or else whosoever, nor for any damages, injuries, losses or delays from whatsoever cause arising that may occur either to such vessel or craft, or property or persons on board thereof, or to any other ship or vessel or property of any kind whether fixed or movable and the Company shall be held harmless and indemnified by the Hirer against all such damages, injuries, losses and delays, and against all claims in respect thereof."

The District Judge held that these conditions of the contract legally resulted in making the faults with respect to lights and absence of crew on the destroyer directly attributable to Boston Metals, her owner, and that these faults might be ascertained in the pending suit without being first litigated in a suit by the Winding Gulf against the tug, because they constituted faults of the master of the tug who, by the terms of the agreement, became in this respect the servant of Boston Metals.

The tug, Peter Moran, was not brought into the instant suit because of lack of jurisdiction in the Maryland court, but subsequently the Massachusetts Trustees filed a libel for damages to the collier against the tug in the Southern District of New York. The New York suit was still pending when the decision in the instant case was filed, but has since been decided by Judge Coxe in *Adams* v. *The Peter Moran*, D. C. S. D. N. Y., 94 Fed. Supp. 520. The case was heard upon the deposition of the master of the tug taken in the Maryland suit and upon a stipulation that the facts were as found by Judge Chesnut in his opinion; and the judge held upon the record, as Judge Chesnut had previously found, that both the ship and the tug were at fault and that the faults of both contributed to the collision. He also held

that the provisions of the towing contract making the master of the tug the servant of the owner of the tow merely served to fix the relationship between the tug and the Boston Metals, and could not affect the liability of the tug [fol. 942] or the liability of the tow, as independent vessels, each one liable to the collier for its own fault. He therefore entered a decree dividing the damages equally among all three vessels, since all were equally at fault, but providing that the collier should not receive more than two-thirds of her damages, taking into account the amount collected from Boston Metals under the Maryland decree.

Boston Metals contends that the great preponderance of the evidence shows that the collision was due solely to bad navigation on the part of the Winding Gulf without any fault on the part of the tug; and that even if the tug was negligent in respect to lights or the absence of a crew on the tow, these faults did not contribute to the accident because the navigators of Winding Gulf had ample warning of the presence of the flotilla by the whistles and the towing lights of the tug.

We do not agree. The vessels approached one another at night in a fog which had set in during the previous hour. The course and direction of the tug was southwest by west while the Winding Gulf was proceeding east by one-half north. The steamer was displaying the usual lights and the tug, in addition to other lights, was showing three lights vertically arranged indicating a tow but not the length thereof. There were two destroyers in tow of which the first had one white light in the proper place, and the second, the St. Francis, had two lights indicating that it was the last vessel in the flotilla. The steamer and the tug each sounded fog signals which were heard by the other and each saw the other's light when one-half mile apart. When they came abreast they were one-quarter of a mile apart. The length of the flotilla was three-fifths of a mile and although the master of the Winding Gulf was aware of the fact that he was approaching a flotilla and although he was not able to determine the length of the tow on account of defective lights on the destroyers, he negligently assumed that it was not more than one-fourth of a mile long and did not make sufficient change of course to clear it, so that the stem of the steamer struck the starboard aft side of the St. Francis.

The record supports the findings of Judge Chesnut that both vessels were at fault, for the reasons set out and discussed in his opinion; and we conclude, as did Judge Coxe [fol. 943] in the New York case, that both vessels were at fault and that the damages should be divided.

The major attack on this appeal is directed against the holding of the District Judge that the faults of the tug are attributable to Boston Metals because of the inclusion of the towing conditions in the agreement above set out. Preliminarily, the libellant questions the existence of the contract as set out in the form of a letter from the towing company to Boston Metals; but the letter was produced and identified by the libellant as the governing towage contract and was offered in evidence by the respondent. The libellant objected to its admissibility on the ground that it was a private contract between Boston Metals and the towing company; that its validity was doubtful; and that it was irrelevant to the controversy relating to the liability of the parties to the collision. These objections, however, were overruled and the document was received in evidence. There can be no doubt that it was recognized by the parties to the litigation as the authentic agreement under which the towing operation was conducted.

We come then to the question whether for the purposes of this case the contract changed the settled rule that a tug is solely responsible for the fault of an inert tow of which it has entire charge. The case is governed in our opinion by the decision in *Sun Oil Co.* v. *Dalzell Towing Co.*, 287 U. S. 291, wherein the court sustained a towing contract between a shipowner and a towing company which was designed to govern transactions between them. It provided that when the captain of any tug engaged in the services of towing a vessel, using its own propelling power, goes on board the vessel he becomes the servant of the owners in respect to the giving of orders to any of the tugs engaged and in respect to the handling of the vessel; and neither the tugs nor their owners should be liable for any damage resulting therefrom in a towing service. Under this contract three tugs undertook to dock a tanker which was using her own power, and the captain of one of them went aboard the ship and acted as pilot, and during the operation the ship ran aground.

The court found that the tugs were not at fault in the grounding, and held also that the shipowner could not recover for the negligence of the tug captain because under the agreement the captain, while on board and acting as pilot, was [fol. 944] the servant of the shipowner and the towing company was not responsible for any act of omission on his part. It was said that the validity of the contract could not be reasonably doubted since the towing company was not a common carrier, the parties were on an equal footing and there was no rule of public policy which denied the effect of the intention expressed in the agreement. The provision that the tug captain while on the ship should be the servant of her owner was held to be an application of the well established rule that if one puts his employee at the disposal of another, such employee is deemed to be the employee of the latter and not of the former; and it was said that it would be unconscionable for the ship owner, upon the occurrence of a mishap, to repudiate the agreement upon which it obtained the service.

Upon the authority of this case the validity of an analogous provision of a towing contract, exempting the tug from liability for damages under certain circumstances, was upheld by the Sixth Circuit in *Great Lakes Towing Co.* v. *Bethlehem Transportation Corp.*, 6 Cir., 65 F. 2d 543, and *Great Lakes Towing Co.* v. *American SS Co.*, 6 Cir., 165 F. 2d 368. A clause in the agreement declared that when a vessel was towed stern first by one tug the service would be under the control of the master of the vessel and the tug would not be liable for any damages sustained by a collision of the tow with any other craft or object. The exemption of the tug was not given effect in these cases because the master of the tug acted upon his own initiative and did not in fact place his vessel under the directions of the master of the ship. Nevertheless it was held, in accord with *Sun Oil Co.* v. *Dalzell Towing Co.*, 287 U. S. 291, that had the master of the tug acted as contemplated in the contract, no liability on the part of the tug would have arisen because in such event the master and crew of the tug would have become *pro tempore* servants of the tow.

The above decisions were concerned only with the effect of the towing contract as between the parties thereto, and

the clause was enforced, when its conditions were met, by relieving the tug owner and tug from liability for damages for injury to the tow. The effect of the contract upon the rights of third parties to recover damages from either or both of the contracting parties was not involved. Such a [fol. 945] right is asserted in the instant case in the claim of the owner of the Winding Gulf to recover from the owner of the tow the damages caused by the negligent operation of the tug.

The tug is not before us since she refused to submit to the jurisdiction of the court and come into the case. She was, however, held liable in the New York suit; and in other cases the liability of the tug to third parties for negligent operation has been sustained notwithstanding the presence of a pilotage clause in the towage contract. See *Robins Drydock & Repair Co.* v. *Navigazione Libera Triestina*, 154 N. Y. Misc. 788, affirmed 261 N. Y. 455; *Moran Towing & Transportation Co.* v. *Navigazione Libera Triestina*, 2 Cir., 92 F. 2d 37. We are not called upon to decide whether the owner of a tug or the tug itself, which is operating under a contract containing the standard towing conditions, may ever escape liability to a third party for injuries caused by its negligence. We have merely to determine whether liability of the owner of a tow to third parties may be based on such an agreement. In *Moran Towing & Transportation Co.* v. *Navigazione Libera Triestina*, supra, such a contract was enforced in a suit against the owner of the tow by the owner of the tug which had been compelled to pay damages to an injured third party; and we see no reason why it should not be given effect in a suit by an injured third party against the owner of the tow. We know of no principle of law which forbids a person who employs another to perform an undertaking for him, in which the other has full control of the operation, from agreeing that he will assume the burdens which an independent contractor would ordinarily bear. Such a contract of indemnity is not unusual. Whether the contract in the instant case was made because the voyage from Sydney to Baltimore was deemed unusually hazardous, or because the owner of the tow was given a lower rate, is immaterial. The contract was deliberately assumed and it would be unconscionable for the owner of the tow to

repudiate it after the accident occurred. There is no difficulty in the assertion of the right by the ship in this case without first establishing the negligence of the tug in a separate suit. The libel was filed by the owner of the tow who had agreed to take the risk of the enterprise and pay any damages that might be incurred, and as was said by Judge Learned Hand in the Kookaburra, 2 Cir., 69 F. 2d 71, 73, [fol. 946] "the admiralty, whose procedure is especially plastic, can skip the by-ways and head direct for the goal."

Affirmed.

IN THE UNITED STATES COURT OF APPEALS

No. 6637

BOSTON METALS COMPANY, Formerly Named Boston Iron and Metal Company, as Owner of the Canadian Destroyer "St. Francis", Appellant,

vs.

S/S "WINDING GULF" and MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, Appellees

Appeal from the United States District Court for the District of Maryland

DECREE—Filed January 4, 1954

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

Morris A. Soper, U. S. Circuit Judge

[fol. 947] [File endorsement omitted.]

[fol. 948] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6637

THE BOSTON METALS CO., formerly named Boston Iron and Metal Company as owner of the Canadian Destroyer, "St. Francis," Appellant,

vs.

S/S WINDING GULF AND MASSACHUSETTS TRUSTEES TO EASTERN GAS AND FUEL ASSOCIATES, Appellees.

PETITION FOR REHEARING—Filed February 3, 1954

Appellant herein prays for rehearing of the decision of this Court dated January 4, 1954, affirming a final decree in favor of cross-libelants-appellees owners of S/S WINDING GULF entered in the United States District Court for the District of Maryland on February 19, 1953.

The principal issue was whether appellant, owner of an inert tow wholly under the direction and control of a towing vessel, could, solely by reason of conditions contained in a contract between it and the towing company, be held di- [fol. 949] rectly liable to the owners of a third vessel with which the tow collided because of fault of those in charge of the navigation of the tug and the third vessel. There was no serious contention that the tow could be liable in the absence of such a contract.

The provisions of the towage contract considered in this connection were:

1) a provision declaring that the master and crew of the tug became servants of the owners of the towed vessel, and

2) a provision whereby the owner of the towed vessel agreed to indemnify the owners of the tug against any damages arising out of the towage.

The District Court based its decision entirely on the first of these two provisions, stating that "no question of indemnity could be litigated in this case." Accordingly,

the case was briefed and argued before this Court on behalf of appellant with a view to establishing that a contract declaring the master and crew of a tug to be the servants of the owners of a towed vessel cannot, standing alone, render the owner of the tow liable directly to a third party not a party to it, where all other evidence plainly showed that the master and crew of the tug were in fact not acting as agents of the owner of the tow. However, in affirming the District Court, this Court did not specifically pass on the question of whether that provision had the effect attributed to it by the District Court. Instead, this Court said:

> "* * * We have merely to determine whether liability of the owner of a tow to third parties may be based on such an agreement. In *Moran Towing & Transportation Co. Navagazione Libera Triestine*, (2 Cir. 92 Fed. 437) such a contract was enforced in a suit against the [fol. 950] owner of the tow by the owner of the tug which had been compelled to pay damages to an injured third party; and we see no reason why it should not be given effect in a suit by an injured third party against the owner of the tow."

Moran Towing & Transportation Co. v. Navigazione Libera Triestine, supra, involved only the indemnity feature of the contract as between tug and tow. That case was not even commenced until after the tug had been held liable to pay damages to a third party (in a suit brought by the third party against both tug and tow, and in which the tow was specifically exonerated. *Robins Drydock & Repair Co. v. Navigazione Libera Triestine*, 154 N. Y. Misc. 788, aff'd. 261 N. Y. 455). By the above quoted language this Court seems to base its decision on a direct application of the indemnity agreement, even though there was no appeal from the District Court's decision that this feature of the contract was not before it, and in spite of the fact that appellees themselves never contended that appellant was liable to them directly because of it, but rather, throughout the entire litigation, disclaimed any intention to rely on it.

Petitioner respectfully submits that this Court's holding

the indemnity agreement directly applicable here is contrary to established legal principles. An injured third party cannot recover against an indemnitor directly, since the contract of indemnity is not for his benefit, (Corbin *on Contracts*, Sec. 779 C, pp. 42-3), and it was never contended by proctors for appellees that this could be done. To the contrary, it was specifically recognized throughout by the District Court that it could not be done. Accordingly, since no issue with respect to the indemnity agreement was [fol. 951] properly before this Court there was heretofore no necessity nor opportunity to brief and argue the point on behalf of appellant. But now, because this Court is making the point for the first time, petitioner respectfully urges and justice requires that a rehearing be granted before the matter is finally disposed of on this basis.

In addition, and of more serious consequence, because there was heretofore no necessity nor opportunity for it petitioner did not introduce evidence available to it relating to circumstances surrounding the making of the contract and bearing on its enforceability against petitioner by the towing company strictly as an indemnity agreement. The probability of subsequent litigation against Boston Metals by Moran, the towing company, in which such evidence would be relevant and necessary to a successful defense was and is anticipated. But this Court's decision has placed petitioner in an indefensible position in such a suit on the indemnity agreement and seems to foreclose all question as to its enforceability. Thus, although in actual fact, circumstances were present which would render the indemnity agreement unenforceable against Boston Metals by Moran, these circumstances have not been shown and cannot be shown unless a rehearing is granted.

Petitioner if given an opportunity can produce evidence establishing that at the time it was confronted with the necessity for moving these destroyers in July of 1945, Foundation Maritime had a virtual monopoly in Eastern Canadian seaports, and it can be affirmatively shown that the tow would not have been moved at all unless the towing conditions contained in the contract in this case were agreed to.

[fol. 952] In *Sun Oil Company v. Dalzell Towing Co.*, 287 U. S. 291, the Supreme Court said:

> "Respondent had no exclusive privilege or monopoly in respect of the services that petitioner desired to have performed for its tanker and petitioner was under no compulsion to accept the terms of respondent's pilotage clause. There is nothing to suggest that the parties were not on equal footing or that they did not deal at arms length."

Thus, the Court recognizes that where the relationship is such that the parties have not equal bargaining power and one of them must either accept what is offered or be deprived of the advantages of the relationship, the contract will not be enforced. This Court has itself recognized this well established rule and in *Fairfax Gas & Supply Co. v. Hadary*, 151 F. 2d 939 at pages 940-1 quotes with approval from 17 *C. J. S., Contracts*, Sec. 262, page 645, 12 Am. Jur. 684 and 6 Williston *on Contracts* (Rev. Ed.), Sec. 1751C, in all of which the rule is announced. See also "*The Significance of Comparative Bargaining Power in the Law of Exculpation*," 37 Col. L. R. 248, and 175 A. L. R. 1, particularly Section 12, entitled "*Exculpated Party occupying quasi-monopolistic position*" and Section 55, pp. 110-113.

It is therefore respectfully suggested that under all the circumstances of this case, justice requires that petitioner be granted a rehearing and an opportunity to present evidence which, because of this Court's new conception of petitioner's liability under the contract, becomes relevant for the first time in this litigation. If a rehearing is granted, it will be shown that indemnity could not, have been enforced directly against petitioner by Moran. If denied, this Court's action would have the effect of enforcing a contract indirectly, which could not lawfully be enforced directly.

[fol. 953] Wherefore, Petitioner prays,

(1) That a rehearing be granted in this case;

(2) That pursuant to the provisions of Supreme Court Admiralty Rule No. 45, an opportunity be given to submit evidence in such form as may be approved by this Honorable Court, to show facts not heretofore established which

would be relevant in a suit against petitioner by the towing company to enforce the indemnity agreement; and

(3) That the decree below be modified to dismiss the cross-libel against Boston Metals and to direct payment by appellees to Boston Metals as owner of the destroyer, I-24, the amount of its damages with interests and costs.

The Boston Metals Company, Appellant, By: John H. Skeen, Jr., Proctor for Appellant.

John H. Skeen, Jr., William A. Skeen, Eugene M. Feinblatt, Proctors for Appellant.

I hereby certify that the foregoing petition is presented in good faith and not for delay and I believe that this petition is based on meritorious grounds.

John H. Skeen, Jr., Proctor for Petitioner.

[fol. 954] In the United States Court of Appeals

February 3, 1954, petition of appellant for stay of mandate filed.

Order Staying Mandate—Filed February 5, 1954

Upon the application of the Appellant, by its counsel, and it appearing that on February 3, 1954, it filed a petition for a rehearing in the above entitled case,

It is now here ordered that the mandate in this case be, and the same is hereby, stayed pending the action of the Court on the said petition for a rehearing.

John J. Parker, Chief Judge, Fourth Circuit.

In the United States Court of Appeals

Order Denying Rehearing—Filed February 10, 1954

This Court having rendered its decision affirming the decision of the United States District Court for the District of Maryland, the Appellant having on February 3, 1954,

presented to the Court a petition for a rehearing of the said cause, and the same having been fully considered.

It is now here ordered by this Court that the rehearing asked for be and the same is hereby denied.

John J. Parker, Chief Judge, Fourth Circuit; Morris A. Soper, United States Circuit Judge; Armistead M. Dobie, United States Circuit Judge.

[fol. 955] February 17, 1954, mandate issued and transmitted to the Clerk of the District Court at Baltimore, Maryland, in due form.

Same day, record on appeal and original exhibits returned to the Clerk of the District Court at Baltimore, Maryland.

March 17, 1954, record on appeal and original exhibits received from Clerk of the District Court.

[fol. 956] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 957] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 70

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.